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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 23

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA,

Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY,
A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

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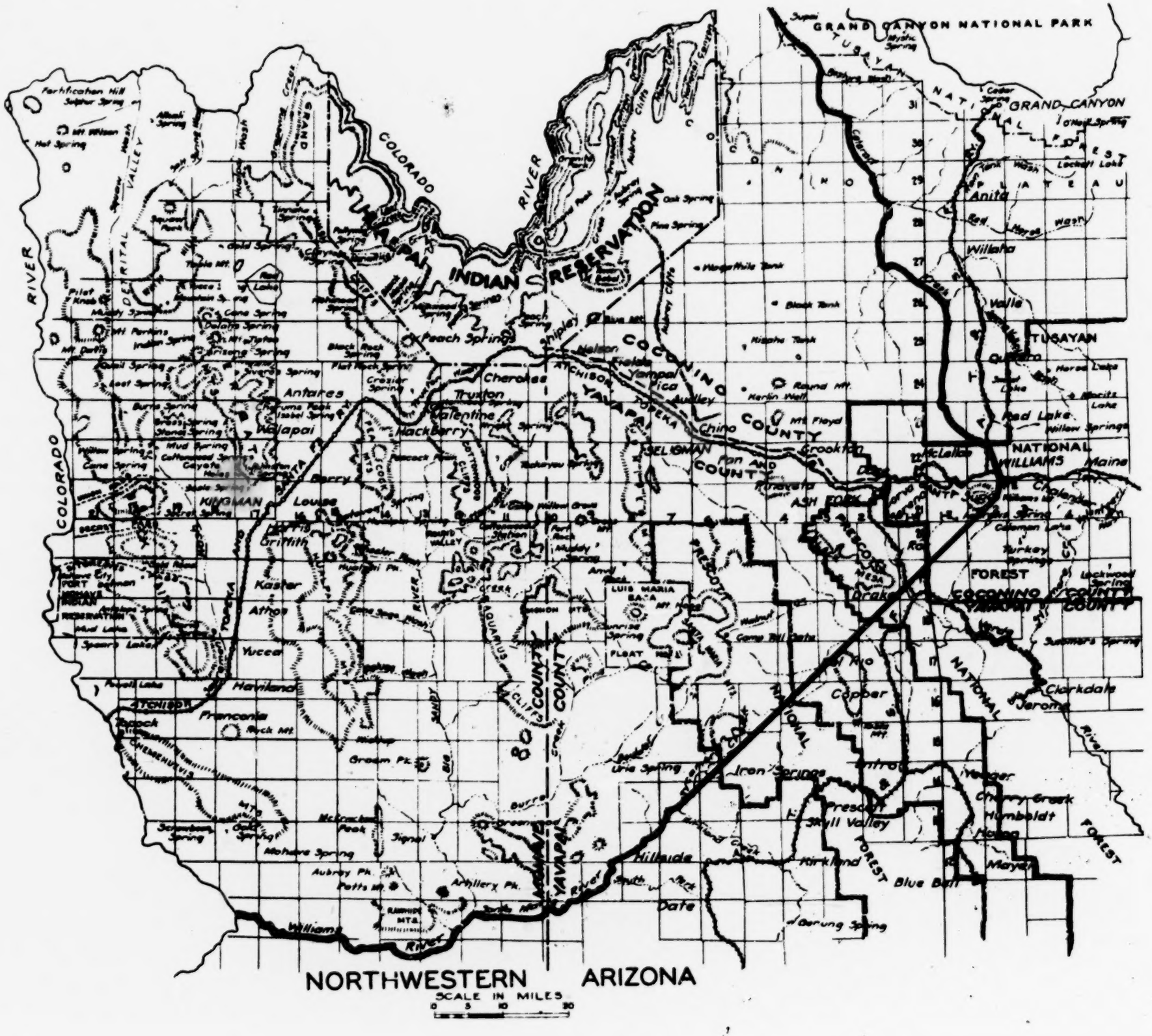
GRAND CANYON NATIONAL PARK
GRAND CANYON
COLORADO RIVER
HAVASUPAI INDIAN RESERVATION
COCONINO COUNTY
YAVAPAI COUNTY
MOHAVE COUNTY
NATIONAL FOREST
Peach Springs
Seligman
Kingman
Williams
Prescott
Jerome
Clarkdale
Cottonwood
Flagstaff
Williams River
NORTHWESTERN ARIZONA
SCALE IN MILES

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Petitioner,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

I.

INTRODUCTORY STATEMENT.

A. *Proceedings Below:*

Respondent is the purchaser of lands granted to the Atlantic and Pacific Railroad Company by the Act of July 27, 1866, 14 Stat. 292 (See Appendix to this brief,[1] 27). In controversy in the *first cause* of action are all lands within

1. Hereinafter cited as "Appendix".

the "Walapai Indian Reservation," and in the *second cause* all lands outside of said "Reservation," excluding the Mojave Reservation, bounded on the North and West by the Colorado River, and on the East and South by the heavy line on the map attached as a frontispiece hereto. (R. 3, 5-7, 11-14.)

Possession in fact of a vast area, comprising about one-eighth of Arizona, and including such towns as Williams, Ash Fork, Seligman, and Kingman, and exclusive possessory rights to all of it, are alleged on behalf of Indians numbering about 450.[2]

In the trial court, Respondent moved to dismiss (R. 24-6), and supported the motion by memorandum of points and authorities (R. 26-190), under the following headings:

I. The Walapai Have Never Been Accorded Any Possessory Right in the Lands Involved Under the Policy and Laws of the United States. (R. 29-67.)

II. Any Walapai Right or Title Has Been Extinguished. (R. 67-73.)

III. Respondent's Title Has Been Vested and Confirmed by the Political Authorities in Such Manner That It Is Beyond Challenge. (R. 73-84.)

IV. The Court Should Take Judicial Knowledge of All the Matters Referred to in the Points and Authorities, and Dismiss the Cause. (R. 84.)

These "points and authorities" contained many references to statutes of the United States (for their textual reproduction, see appendix hereto, separately filed), to the Congressional Globe and Record, to decisions of the Supreme Court construing the grant to the Respondent and

2. Lieutenant Colonel Brayton's census of 1888, the first authentic census, as distinguished from prior estimates, showed 646, living at various places, working for white people, a few cultivating gardens. (Walapai Papers, 187-8). In 1924 the Board of Indian Commissioners reported that the "population of 440 Walapai Indians, with the exception of a few families, live in towns scattered along the Santa Fe Railroad for a distance of 100 miles. * * *" (*Ibid*, 204.) The same Board reported in 1928: "Principally because of the demand for unskilled labor, the Indians are allowed to remain in their nondescript camps on the edges of town." (*Ibid*, 208.)

other statutes, to opinions of the Attorney General, to constructions of the laws of Spain and Mexico, to executive documents and other authentic references which show the history of the area in question and of the Indians and the railroad, and to other matters which are known to the Courts without proof. The method employed was that described by this Court as appropriate in *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292. The theory of judicial knowledge employed was the theory of such cases as *Arizona* v. *California*, 283 U. S. 423; *Nev-Cal Electric Securities Co.* v. *Imperial Irrigation District*, 85 F. (2d) 886, 904-6, certiorari denied, 300 U. S. 662; *Hoyt* v. *Russell*, 117 U. S. 401, 404-5; *Jones* v. *United States*, 137 U. S. 202, 214-16. Its substance is that a false pleading of matters of public history will be judicially determined to be untrue. Compare *United States* v. *Sandoval*, 231 U. S. 28 (an Indian case), reversing because of facts judicially known.

The trial court, upon extensive arguments and voluminous briefs, dismissed the petition (R. 190-196); and this action was affirmed by unanimous opinion of the Ninth Circuit Court of Appeals. (R. 204-213; 114 F. (2d) 420.)

There was no "confusion" in the Courts below, no "essential ambiguities" in what either did. Both held that the laws of the United States, and their interpretation and application by the Executive branch of the government, had confirmed in Respondent full beneficial ownership of the lands in litigation, and denied to the Indians the rights asserted for them. Both considered immaterial any proof which could be offered as to nature and extent of occupancy by Indians, and as to their tribal organization. Thus the trial court referred to certain references as proving, not the point on possession and tribal organization on which they had in part been cited (see footnote 3, page 8, Petitioner's brief [3]), but as proving that the Walapai were of

3. Hereinafter referred to as "Brief".

the savage tribes referred to in the Treaty of Guadalupe Hidalgo, and had no rights from the laws of Spain and Mexico. The trial court stated—and this the Petitioner has not challenged in either Court below or here—that "plaintiff * * * does not controvert this point."[4] If the point is controverted here, Petitioner must reverse its admission in both Courts below. The trial court made no finding as to actual occupancy or tribal organization; indeed, expressly held that such questions were immaterial in view of "the controlling effect of public law and public administration, which the Court judicially knows." (R. 196.) The Circuit Court of Appeals noted the incontrovertible fact that the Walapai were forcibly removed in 1874 to the reservation provided for them in 1865 by Congress (R. 211); but with no other reference to possession in fact, held on the basis of the laws of Congress and their lawful administration, the act of 1865 among them, the effect of which "can not be affected or overcome by testimony of possession, * * * that the Walapai * * * have no recognized right of possession of public lands other than in reservations set apart by the government for the tribe." (R. 212.)

B. *Status of First Cause of Action.*

The particular background of this litigation pertains almost exclusively to the first cause of action. Since 1919 there has been some official discussion of Walapai rights; but all has related to lands in the first cause of action, and none to lands in the second. In 1919-20, the Secretary of the Interior determined that "the railroad company has full, complete and incontestable title to the odd-numbered sections in this [Walapai] Reservation," and so advised Congress in 1923. (Walapai Papers, 320-21, 206-7.)[5] He

4. R. 192. The Circuit Court said: "Since it is conceded that the title of the United States was absolute, except in the case of certain grants * * *."

5. References to Walapai Papers, Senate Executive Document 273, 74th Cong., 2nd Sess., will hereafter be abbreviated to W. P.

proposed in 1923, to avoid the inconvenience of Indian occupational rights in only alternate even-numbered sections, legislation which became the Act of February 20, 1925 (43 Stat. 954, Appendix 68), authorizing exchanges within the reservation boundaries of "*privately owned* and *State school lands*" and of "any valid filings, under the Homestead Laws or of other valid claims within the Walapai Indian Reservation * * *, so that the lands retained for Indian purposes may be *consolidated and held in a solid area* so far as may be possible." (Emphasis ours.) The Senate Committee hearings held in July, 1931, related to lands in the first cause (W. P., 239-354); and these proceedings were followed in September and November, 1931, by opinion of the Solicitor for the Interior Department and the Assistant Attorney General (W. P. 318-27), sustaining Respondent's claims to first cause lands. On June 13, 1932, the Senate tabled a resolution introduced by Senator Frazier, which would have directed delay in consummation of agreement for exchange of first cause lands negotiated under this Act of February 20, 1925.[6] This suit ensued, involving for the first time any question of Respondent's patented lands.

Respondent has, pursuant to Section 321(b) of the Transportation Act of 1940, conveyed to the United States all first cause lands. There have been filed with the Clerk of the Court certified copies of the complete evidence of the transaction which has resulted in the United States becoming possessed of all claim and title of Respondent

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6. The resolution read:
"Resolved: That the Secretary of the Interior is hereby requested to delay final consummation of the proposed exchange of lands within the Hualpai Indian Reservation with The Atchison, Topeka and Santa Fe Railway Company pursuant to the Act entitled 'An Act to Provide for Exchanges of Government and Privately Owned Lands in the Hualpai Indian Reservation, Arizona,' dated February 20, 1925, pending further investigation of the proposal by the Senate Committee of Indian Affairs and the final disposition until the 72nd Congress has such additional legislation as the committee may recommend in connection therewith." (75 Cong. Rec., Part 14, p. 15175.)

to the lands of the first cause of action. (See also Appendix, pp. 77 to 89.)

Counsel (Brief, 11) assert that the reconveyance by the Respondent to the United States of America of all lands granted, claimed to have been granted, or which should have been granted, as evidenced by the above mentioned quitclaim and instrument of further assurance, have no relevance to the merits of the pending action so far as the first cause of action is concerned. The first reason assigned is that the Indians are still entitled to an accounting under the first cause of action "for all rents, issues, and profits derived from the leasing, renting or use of lands subject to such right of occupancy by such Hualapai Tribe" (R. 20). We have no desire meticulously to narrow the cause of action or the prayer for relief by reliance upon or reference to a lack of specific clarity. However, we can be forgiven or even a mistaken conclusion that the words of the prayer "that the said defendant be required to disclose the extent of its claims, and assignments or conveyances thereof, and to account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy" (R. 20) related back only to that part of the petition contained in paragraph 10 of the second cause of action. There alone does Petitioner ask for an accounting. If we are mistaken in this and it was the intention of the pleader to ask for an accounting with respect to the first cause of action, it still remains true that as stated by counsel (Brief, 11) the primary relief sought now in the first cause of action is "an adjudication that the tribe has a right of occupancy and use in these lands." As to that primary issue and with respect to that primary relief Respondent is no longer interested and the issue is transferred by Respondent to the United States. The conflicting issues, to determine which Petitioner insists upon continuing the

cause, are conflicts as to which Respondent as a party to the litigation is in no wise concerned and interest in them is exclusively confined to the United States as guardian of the Indians and representing the Indians' claims on the one hand, and the United States in its sovereign capacity and as proprietor of public lands and the public domain on the other. We continue to believe and to assert that even if the execution of the quitclaim has not entirely eliminated the first cause of action, because of the broad and liberal construction of the prayer, it certainly has rendered it unimportant so far as this respondent is concerned.

Under the adjudication sought, the Department of the Interior would be able to avoid the application of the Act of May 25, 1918, 40 Stat. 561, reading:

> "That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress. (Sec. 211, Title 25, U. S. C. A.)

When it was determined that the odd-numbered sections in the "reservation" belonged to the Respondent, and were not within a reservation, the Secretary of the Interior, in so advising Congress, reported:

> "The act of April 21, 1904 (33 Stat. L., p. 211), provides that any private land over which an Indian reservation has been extended by Executive order may be exchanged by the owners for lands outside of the reservation, but in view of the act of May 25, 1918 (40 Stat. L., p. 570), which prohibits the creation of an Indian reservation or an addition to one already created within the States of New Mexico and Arizona except by act of Congress, this Department has held that an exchange under the act of 1904 might be considered as a violation of the spirit and intent of the act mentioned." (W. P., 207.)

In result, Congress passed the Act of February 20, 1925

(Appendix, 68), authorizing, not the extension of Walapai rights to all lands in the "reservation," but the consolidation of holdings by exchanges of Indian even-numbered sections for railroad odd-numbered sections.

C. *The Issues and Some of the Interests Involved.*

Three of four bases of action asserted in the petition and argued in the District Court are abandoned. It is no longer contended that the lands in issue were not granted, or that the executive order of 1883 setting aside the "Reservation" made the grant ineffective as to first cause lands, or that as to them the doctrine of adverse possession is applicable. The sole contention now is that the grant consisted only of the naked legal title, encumbered by the actual and exclusive right to and possession by the Walapai—in effect that nothing of substance was granted. The case stands, we suggest, as an action solely by and on behalf of Indians against Respondent, but also against the interests of the sovereign and proprietary rights of the United States.

The counsel for the Walapai find themselves, with respect to the questions of Indian right, opposed, in a field indubitably one of political and not judicial cognizance, to everything that has been done by the United States in its sovereign and proprietary capacity, for more than ninety years. Thus, the Department of Justice declined to appear for the Walapai, though consenting to have the Department of the Interior "prepare the present case," because the Department of Justice "has taken the opposite position in the Court of Claims that there is no Indian right of aboriginal possession which will ground a claim against the United States" (R. 215-16). The position taken is that which was honored in a number of Court of Claims cases, for example *Duwamish, et al., Indians* v. *United States*, 79 Ct. Cls. 530. The opinion thus sets forth the position of the Department of Justice.

speaking for the United States as sovereign and proprietor:

> "'* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court; that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'" (p. 597.)

This position was approved in its fullest scope by the Court of Claims. (This Court refused a writ of certiorari, 295 U. S. 755.) It is the position long maintained by the Chief Executives of the Nation, with the advice of the Attorneys General and other members of the Cabinet (R. 99-109). It is the position correctly descriptive of the Constitution and the laws. It is the position maintained by the present Solicitor of the Department of the Interior when acting as counsel for the government rather than as advocate for the Indians. Advising on Papago rights, the cases bearing on which are made much of in the present case by him as Walapai counsel (see petitioner's treatment of *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, and *Law* v. *Pueblo of Santa Rosa*, 249 U. S. 110), he concluded:

> "It follows that the question of the appropriate manner of protecting the Papagos in their possession was, and still is, a matter exclusively of political cognizance. * * * The present measure of the legal rights of the Papagos is the Executive order of February 1, 1917, as modified by the Act of February 21, 1931." 54 I. D. 359, 370.

With respect to first cause lands, the Secretary of the Interior called to the attention of Congress the fact that they were not Indian reservation lands and that there-

fore Congress had forbidden that they be devoted to Indian use. Congress enacted legislation on the strength of this report. Now that the lands are the property of the United States, counsel for the Walapai seek an adjudication in this case in which only the Indians and the Respondent are in fact represented, that first cause of action lands may be dedicated to Indian use despite the law of Congress which made them, until changed by Congress, a part of Arizona that could not be used for Indians. Further, and equally despite this law, the Indians seek a decision which will permit the dedication to Indian use of all second cause of action lands.

The Respondent is the holder of the warranty of the United States, issued by the Chief Executive of the nation pursuant to his duty and authority, conveying to Respondent the *right and title* to second cause lands, "to have and to hold the said tracts with the appurtenances thereto." (R. 21-24.) *Florida* v. *Georgia*, 17 How, 478, 481, 492. For these conveyances, a large price has been exacted, and continues to be exacted. The Indians could not have prevented these dispositions. The United States does not permit Indian action against itself because of them.

D. *Summary of Argument.*

Counsel for the Walapai assert that because of occupancy alone these Indians were entitled to a possessory right enforceable against everyone but the sovereign (Brief, 13-14, 15, 16). Admitting that such a right can flow only from law (Brief, 16), its existence is sought to be proved—

1. by the universal absolutes in the dictum of cases which decided tribal rights established by treaty, and of one case deciding an individual right to lands fenced and cultivated (Brief, 15-30),

2. by the fact that Congress extended Indian trade and intercourse laws, or such thereof as might be

locally applicable, none of which had any possible power to initiate rights to land (Brief, 36-47),

3. by cases which applied Indian laws to Indians, on lands granted by prior sovereigns and confirmed to them, or on reservations otherwise given by the United States, and by two decisions in cases involving Papago claims to Pueblo status and a Spanish grant, neither of which decisions was on the merits (Brief, 15-30), and

4. by "executive interpretation of the 1886 act and executive action with respect to lands of the Mexican cession," which consists of (a) the covenant with Mexico in the treaty of cession not to remove Indians like the Walapai or settle their lands with American citizens in such way as to drive the Indians into Mexico, (b) Indian treaties with certain Indians, but not Walapai, and (c) the fact that executive regulations did not expressly deny the Walapai the rights now claimed.

From these four premises only the conclusion is drawn that the Walapai have the rights claimed, outside of one reservation made by Congress, and another made by the President, of lands for their use (Brief, 13-15). This right, so established, is said to be preserved and protected, but not created or recognized, by a covenant from the United States to the railroad to extinguish Indian title, but only by voluntary Indian cession. This covenant to the railroad seems to be considered as having efficacy to convey a new sort of title, or convert the old Indian title from a mere right of possession, at the will of the United States, to a title that cannot be interfered with by the United States except by Indian consent, or an *express repeal* of the granting act in the exercise of the power of eminent domain.

Congress intended to grant and did grant to the railroad the lands in issue, in full right and title; and many acts of Congress and attendant authorized administration have concretely vested the benefits and burdens of this right and title. The intention of Congress in disposing of the public

domain, and in dealing with the Indians is controlling; and not only the granting act, but almost a century of consistent dealing by Congress and the Executive with the lands, the settlers, the Indians, and the institution of Arizona, have manifested and realized one clear purpose, to develop all the lands of Arizona with specified exceptions known as reservations, for and by white men. To this end the Indians were forced on reservations and the railroad grant itself was made. Settlers were given lands. Lands were granted to the Territory and State. All of Arizona, outside of established reservations prominent on any map, was open to acquisition by settlers and the railroad. Against the powerful and repeated manifestations of sovereign intention, and its concrete realization in Arizona as it is, the structure of the Indians' case has no more weight than a shadow.

Though conceding that the laws of Spain and Mexico are immaterial, and resting their case entirely on the laws of the United States, counsel discuss the laws of Spain and Mexico (Brief, 59-80), apparently in an effort to deny the implication that they (and not we) are able to draw from the opinions of the courts below, to the effect that these laws had some efficacy to prevent the Walapai from acquiring rights under the laws of the United States. Congress inquired what rights such Indians had under the laws of Spain and Mexico. To its own satisfaction, it found they had none, and determined to concede to none of the inhabitants of the ceded territory greater rights than enjoyed under Spain and Mexico. This determination was conclusive; it was also correct.

The decisions below gave effect to the absolute and controlling power of the sovereign intention and its application, holding irrelevant such questions as the nature and extent of Walapai "occupancy in fact" and the nature, if any, of Walapai tribal organization. Counsel for the Walapai do not understand what the courts below held

(Brief, 59), thinking that these irrelevancies were not only entertained but were controlling. They wish a trial to establish the nature and extent of "occupancy in fact," which to them has some vital legal property, potent to create an exclusive right against everyone despite the intent of the sovereign in inviting everybody but the Walapai to occupy and use the lands they claim, and in denying the Walapai all power to interfere with the realization of the sovereign will. They wish to try as a fact the issue of whether the Walapai ever voluntarily ceded rights which they never possessed, and this in the presence of the known intent of Congress and its actual realization, sufficing to deny them the lawful right to assert any such right or claim, no matter how great their desire to retain it or obstinate in fact its continued assertion.

II.

Construction of the Act of 1866 Shows That (A) Congress Intended to Grant and Did Grant to Respondent Full Beneficial Ownership of the Lands in Question and (B) Congress Did Not Intend by the Act to Concede Walapai Title or Limit Otherwise Sovereign Power to Deny the Walapai Possessory Rights.

A. *Congress Intended to Grant and Did Grant to the Railroad Full Beneficial Ownership of the Lands in Question.*

The central feature of the Act of July 27, 1866, (14 Stat. 292, Appendix, 27) is a grant of lands to the railroad. It is a present grant, and for a purpose, namely, to aid construction. To serve this purpose, the railroad would have to have the full *right and title;* and "full right and title" was intended to be granted, evidenced as soon as possible, after the completion and acceptance of each 25-mile section and the survey of the lands, by a patent over

the signature of the President (Sec. 4). When, conformably to the provisions of Section 4, the President approved the report of the Commissioners and executed the patents, he thereby (as authorized by Congress) confirmed the *right and* title of the grantee. There is now no question about title. The United States had full title at the time of the grant and passed it to the railroad. But the title the railroad received, Petitioner contends, was only a paper title; the right remained with the Indians. But the language of Section 4 says that the President shall confirm the *right and* title. Does "right and title" mean no more than "title"? If it means more, how much more short of complete title? In so far as second cause lands are concerned, the complaint alleges that Respondent holds patents, the highest confirmation of vested right and title, executed by the President of the United States, conveying the lands "to have and to hold." (R. 24.) A substantial body of lands was contemplated as susceptible of this immediate full beneficial ownership; for the construction contemplated was substantial and the need to aid it immediate and great.

This substantial body of land granted the railroad was not susceptible of location until the road should file its map of definite location; and in the meanwhile Congress did not desire to subject settlers, whom it was encouraging to locate by all means, including the building of the railroad, to the risk of settling and finding subsequently that they were on land belonging to the railroad. Hence by Section 3, Congress encouraged settlement on the granted lands by assuring settlers that they would have prior rights to any odd-numbered sections on which they might settle prior to definite location of the railroad. *Nelson* v. *Northern Pacific R. Co.*, 188 U. S. 108. Indisputably, among the lands granted the railroad were those public lands open to entry and settlement; and we will hereafter point out that

all Arizona, outside of formally created reservations, had been open to such entry since 1854.

After the lands granted had been located, they were not to be open to entry before or after survey "except by said company" (Sec. 6); but the even-numbered sections were to be open to both homestead and preemption. Thus, the purpose to encourage settlement and white development by granting lands both to settlers and the railroad is manifest.

Where was located this large body of lands open to immediate white settlement and immediate full beneficial ownership by the railroad? An examination of the situation which Congress dealt with affords a complete answer. In 1866, no Indian title existed in Missouri (R. 38). Indian Territory was all held by Indians under treaties. There were no public lands in Texas. The only exceptions to the application of the land laws and the grant in California were rights under Spanish and Mexican law and reservations created by the United States. *Barker* v. *Harvey*, 181 U. S. 481. All lands in New Mexico (including Arizona), except lands in specified reservations, had been open to settlement since 1854 (Appendix, 19). In consequence, Congress intended an immediate beneficial grant of lands in Missouri, Arizona, New Mexico, and California, and did not contemplate any Indian possessory right, depriving the title upon which it is an encumbrance of every beneficial incident, as standing in the way of its enjoyment, except in Indian Territory and reservations elsewhere.

This construction, clear from any effort to apply the intent of the grant to the ground, is rendered even more certain by consideration of the legislative history of the covenant of the United States in Section 2, to extinguish Indian titles. (See Congressional Globe extracts, R. 109-120.) The proviso "and only by their voluntary cession," was inserted as an amendment at the behest of tribes in

Indian Territory, and is in the very words of protection contained in their treaties. In the legislative history of the Indian provision of Section 2, there is no consideration of any Indians outside Indian Territory. In the light of ground conditions, this circumstance is highly significant.

Additional force is gathered to this construction by the provisions of Section 17. In enumerating the sources from which the company was expected to need and authorized to accept grants, donations, loans, powers and other assistance, Congress, so far as Indians were concerned, authorized acceptance only from "any Indian Tribe or Nation through whose *reservation* the road herein provided for may pass." The enumeration in Section 17 is on its face obviously intended to be exhaustive of the sources from which the company was expected to need or from whom it would be advantageous for it to accept grants or other assistance. The Congress at the date of the Granting Act could not determine with precision just what lands the railroad would pass through. Yet, if Petitioner's contention is accepted, the road could not obtain rights under Section 17 from Indian tribes in possession of lands by immemorial occupancy, but could from Indian tribes having reservations. The Indians of Arizona without reservations, and the Walapai who had a reservation, could have denied their consent to the very taking of the right of way across lands not in reservations; and to the theory of the Indians' counsel, there would have been nothing that either the sovereign or the railroad could have done about the matter except possibly by way of eminent domain proceedings. Congressional omission from Section 17 of lands merely occupied is a clear negation of the existence, anywhere within the lands through which the road might be expected to pass, of the rights contended for by the Walapai. Indian tribes with reservations were, in truth, the only tribes with legal rights to the lands to

be traversed; and these tribes and their lands were the Indians and lands referred to in Section 2. The Walapai had their 1865 reservation (Appendix, 26) on lands far outside those here in issue; outside that reservation the lands were granted the Railroad in full right and title.

The dominant purpose to grant these lands, manifest from the act and all that went before it, was continued in repeated supplemental legislation, and the administration of the Granting Act and other statutes. We will review this subsequent history in detail later; here we summarize.

For ninety years according to Petitioner, the Walapai Tribe has had a right of ownership, based on immemorial possession, enforceable in the courts of law or equity against everybody (including a grantee from the Government) except the United States. This right of ownership carried with it complete use and occupancy, and the right to enjoy and obtain the full fruits of complete ownership. This right emanated not from a previous sovereign, not from any specific right or title declared or recognized by the new sovereign, but from a public policy which had already been established by "the long series of federal statutes and decisions of this Court," a policy of protecting aboriginal occupancy (Brief, 16). While these statutes and decisions had no direct or specific relation to these Indians, indeed dealt with entirely different circumstances and conditions, they were said to create a general policy, to elevate it into a rule of property and to make it applicable everywhere and to all classes of Indians within the territorial boundaries of the United States. Thus says Petitioner.

During this same period and with direct and specific relation to these Indians, the United States (acting through its legislative and executive branches) has acted in an exactly opposite manner. It has treated these lands as not affected by any possessory right, but as "public land" subject to sale or other disposition as it saw fit.

During the 75 years since the granting act of 1866 was passed, or more strictly during all of the 69 years since the Atlantic & Pacific filed its map of definite location, the contracting parties (the United States and the railroad) have repeatedly and definitely acted upon a theory wholly inconsistent with that of Petitioner—a theory that the United States had full title at the time of the grant, and granted that full title to the Atlantic & Pacific.

If there be ambiguity or uncertainty as to what is or is not a public policy relied upon; if there be uncertainty as to its applicability to the territory of Mexican cession or to these particular Indians; if there be ambiguity or doubt as to the meaning of the granting act of 1866 or to the acts of Congress *in pari materia*, then resort may be had to the prior, contemporaneous, and subsequent interpretation given to those acts, by those officers of the Government charged with their administration, and to the construction given to the contract by the contracting parties. This is a familiar doctrine, often applied by this Court.[7]

Some or many of these acts and actions will need to be referred to and treated in detail in the main body of our brief to answer Petitioner's arguments and contentions. Covering so long a period, it may be guessed that they are numerous. Despite this necessary treatment in our main brief, we hope that the Court may secure in one place and at one time a distinct view in retrospect of just what has taken place over this long period. This will serve to fix the present case in its proper perspective. To that end

7. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827).
United States v. *State Bank of N. C.*, 6 Pet. 29, 39 (1832).
United States v. *MacDaniel*, 7 Pet. 1 (1833).
United States v. *Moore*, 95 U. S. 760, 763 (1877).
Brown v. *United States*, 113 U. S. 568 (1885).
United States v. *Alabama Railroad*, 142 U. S. 615 (1892).
McMichael v. *Murphy*, 197 U. S. 304 (1905).
United States v. *Hammers*, 221 U. S. 220, 228 (1911).
Santa Fe Pacific R. Co. v. *Lane*, 244 U. S. 492 (1917).
United States v. *Minnesota*, 270 U. S. 1 (1926).

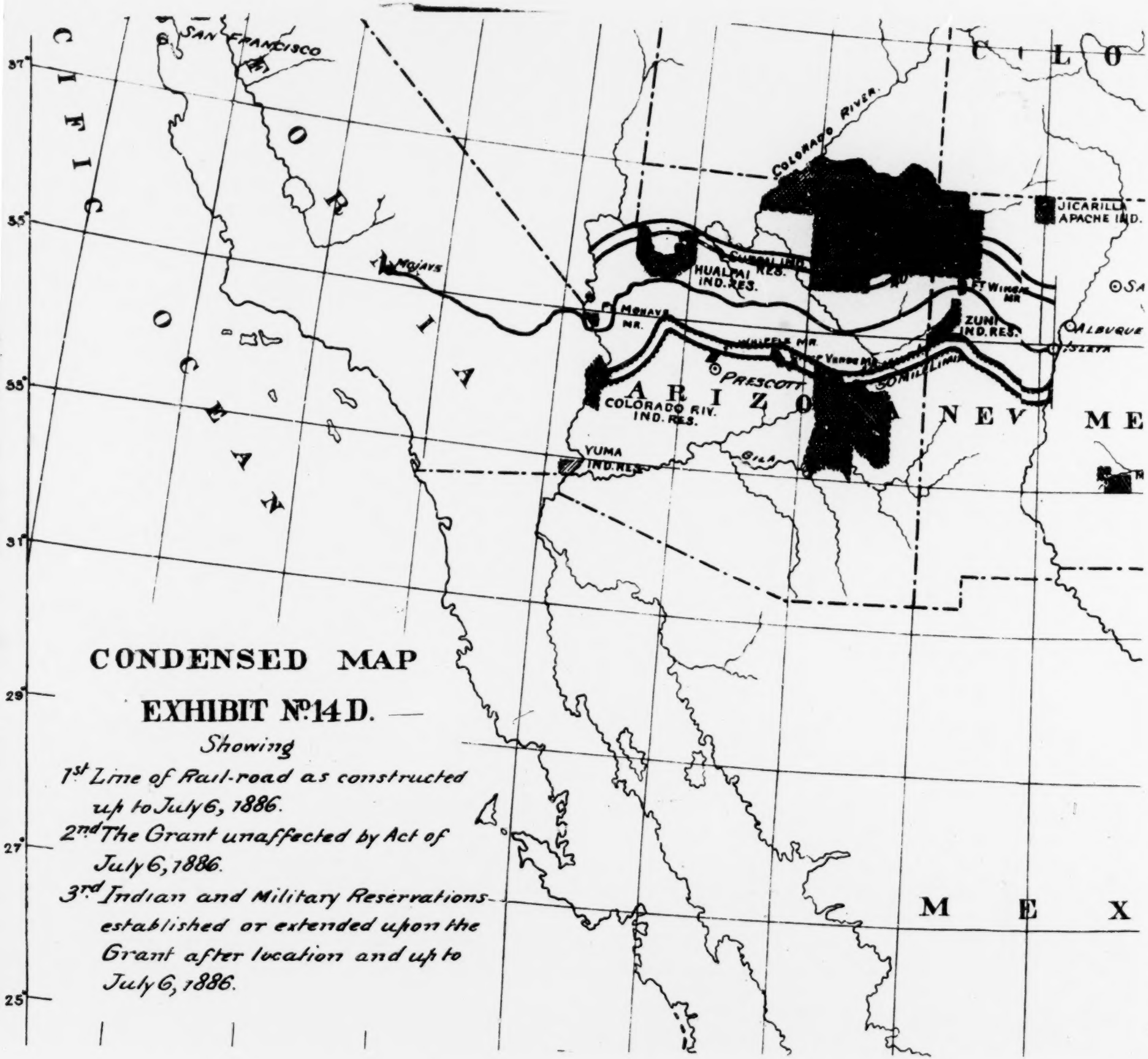
re have inserted in the Appendix, as Part V thereof, a ird's-eye view of legislative and administrative history rom the beginning to and including the latest expression f legislative will, the Transportation Act of 1940. We re confident that this broad, general survey will be con-incing as no other exposition may be of the enormity f that which is now sought to be perpetrated, of the hallenge of the good faith of the United States itself ecessarily implicit. The Court will see that the United tates has treated all of these lands, in all of this broad xpanse of territory, exactly alike, under one fundamental rinciple that the even and odd sections are equally under he public domain, parts of public land, and were to be reated and disposed of in accordance with the will of the nited States. It will see that the rule contended for by etitioner will affect not only Respondent, serious as that ay prove to be, but also all holders of title within this erritory, whether such holder be State or individual.

In 1871, Congress permitted the mortgage by the rail-oad of "its * * * lands" (Appendix, 42). "No one ould * * * loan money upon them, so long as the Indian ight of occupancy attached." *Leavenworth, L. & G. R. o.* v. *United States*, 92 U. S. 733. By the Act of 1886 Appendix, 44), Congress forfeited all lands opposite un-onstructed portions. Outside of the line in Missouri and ndian Territory, the Atlantic and Pacific's constructed ne extended from Isleta to the Colorado River. All the ountry along this route was once "occupied," in one ay or another, by savages, none of whom except the avajo had ever "voluntarily ceded" claim to any of it R. 92-4). Four days after the act of forfeiture, Congress ok steps to insure the early survey at railroad expense f lands opposite constructed sections, and their early bjection to taxation (Appendix, 44). Lands not bene-ially owned would have no value to be taxed.

Investors, quite sure in Congress's intention about title to these lands, loaned money upon them; and Cong made provision in 1897 for a foreclosure sale, the for tion of Respondent to become the purchaser of the la from Isleta to the Colorado, and a quitclaim of the la forfeited in 1886 (Appendix, 56). "No one would them * * * so long as the Indian right of occupa attached to them." *Leavenworth, L. & G. R. Co.* v. *Un States*, 92 U. S. 733. In 1902, Congress, in authori certain relations between Respondent and The Atchi Topeka and Santa Fe Railway Company, provided the grant lands (situated from Isleta to the Colorado) "to remain as now chargeable with taxes assessed and lected under and by virtue of the laws of said Territo of New Mexico and Arizona" (Appendix, 60).

Second cause lands are patented; first cause lands determined by the Secrtary of the Interior to belon Respondent, and he so reported to Congress in 1923. gress acted on this report, and in 1925 passed a law permit exchanges of the Indian even-numbered sect for odd-numbered sections owned by Respondent (Ap dix, 68).

From the very first, all the lands here involved, other lands in the grant from Isleta to the Colorado, involved in the process of adjudication and in the pro of exchanges where settlers had gone upon the land ignorance of the railroad's rights. Involved in this pro was litigation; and in none of the process, including litigation, was there ever suggestion that the Indian ri attached to any lands before a reservation was mad that the railroad had anything but perfect title to it claims in this litigation. In *Atlantic and Pacific R Co.* v. *Mingus*, 165 U. S. 413 (1897), one of the early c before this Court involving this grant, the validity of forfeiting act of 1886 was directly involved; but whole history of the grant and the lands passed by it,



CONDENSED MAP

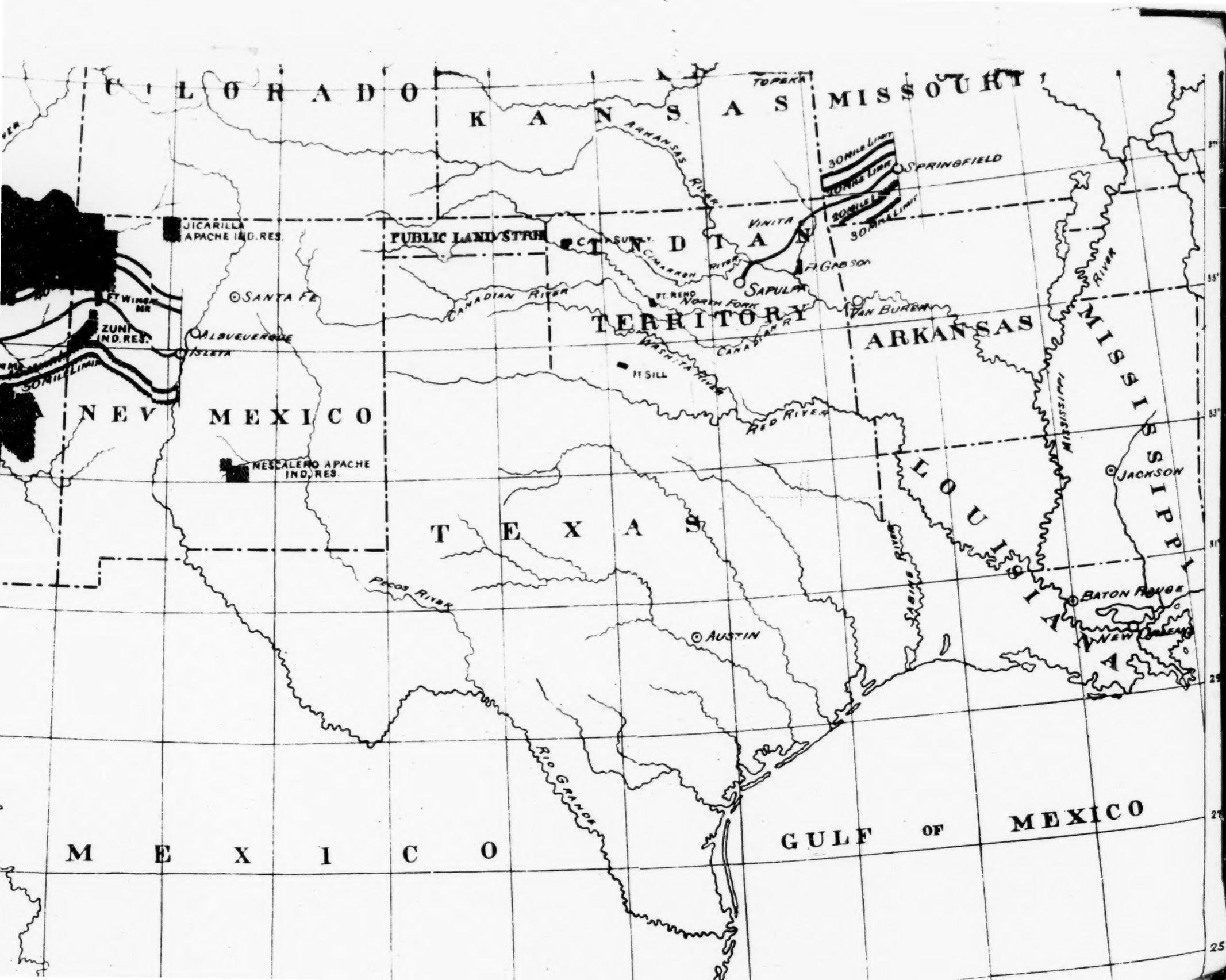
EXHIBIT No. 14 D.

Showing

1st Line of Rail-road as constructed up to July 6, 1886.

2nd The Grant unaffected by Act of July 6, 1886.

3rd Indian and Military Reserrations established or extended upon the Grant after location and up to July 6, 1886.


COLORADO
KANSAS
MISSOURI
TOPEKA
SPRINGFIELD
30 Mile Limit
JICARILLA APACHE IND. RES.
PUBLIC LAND STRIP
INDIAN TERRITORY
VINITA
FT GIBSON
SAPULPA
FT RENO
NORTH FORK
VAN BUREN
ARKANSAS
SANTA FE
FT WINGATE
ZUNI IND. RES.
ALBUQUERQUE
ISLETA
CANADIAN RIVER
WASHITA RIVER
FT SILL
RED RIVER
NEW MEXICO
MISSISSIPPI
MISSISSIPPI RIVER
JACKSON
NESCALERO APACHE IND. RES.
LOUISIANA
BATON ROUGE
NEW ORLEANS
TEXAS
PECOS RIVER
AUSTIN
SABINE RIVER
RIO GRANDE
MEXICO
GULF OF MEXICO

conditions in the territory in general, were part of the case. The United States was represented.

It is noteworthy that the grant here involved has been before this Court on five occasions.

United States v. *Southern Pacific*, 146 U. S. 570 (1892).

Atlantic & Pacific v. *Mingus*, 165 U. S. 413 (1897).

Santa Fe Pacific v. *Lane*, 244 U. S. 492 (1917).

Santa Fe Pacific v. *Fall*, 259 U. S. 197 (1922).

Santa Fe Pacific v. *Work*, 267 U. S. 511 (1925).

But in none of these cases, though vigorously prosecuted and defended, was the question presented or even hinted at which now furnishes the occasion for the sixth appearance before this Court.

The *Mingus* case demonstrates that the Indians in Indian Territory refused to cede their lands and the United States took no action to enable the railroad to be built through Indian Territory or a major part thereof, with the net result that construction was stopped in the early 1870s. This circumstance and the fact that the United States had created Indian reservations in Arizona and New Mexico along the line of the projected route were relied upon by the railroad to show that Congress itself had delayed construction and, that in consequence the act of forfeiture was unlawful. There was no intimation in the case by the railroad, as counsel for the Walapai assert (Brief, 91, footnote), or by any one else "that there were outstanding Indian occupancy titles along this proposed route." The railroad complained that the Government had created Indian reservations. What those reservations were is not in doubt. We reproduce and append hereto copy of Exhibit 14B, appearing between pages 284 and 285 of the Mingus record. The railroad was complaining of Executive order reservations, and the only intimation about Indian right in the opinion of the Court was to the effect that if Congress sought to dispose of lands granted the

railroad, of reservations made after the filing of the map of definite location, "such action might be void, but that would be no answer to the obligation of the [railroad] company to complete its route within the stipulated time." (165 U. S., at 441.)

In *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492 (1917), this Court had before it action of the Secretary of the Interior in adjudicating that four sections located near the southeast corner of Baca Float in the second cause of action lands belonged to the railroad, pursuant to the discretionary duties confided to him by law. It is said by the Court (p. 496): "The plaintiff's right to the odd-numbered sections is not questioned; indeed it is the basis of the Secretary's demand" for survey moneys. In this case, the Court passed upon one phase of the process by which the Secretary of the Interior, acting under lawful authority, has confirmed in Respondent the tax burdens of complete beneficial ownership, requiring it to pay costs of surveying its lands and, as pleaded, issuing patents over the signature of the President to all the lands in issue except the first cause of action lands, concerning which there is lacking only the evidence of adjudication that would be added by patent.

The processes of exchange, which had gone on continuously all over the territory, are exemplified in *Santa Fe Pacific R. R. Co.* v. *Work*, 267 U. S. 511 (1925), and *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197 (1922). The binding nature of the determinations by the Secretary of the Interior, and the nature of Respondent's rights as property protected by the Constitution, are apparent from Mr. Justice Holmes' opinion in the case against Secretary Fall. The railroad lost its case against Secretary Work, just as it must win this one against the Indians, because the conclusion of the Secretary in both cases can not be said to be "capricious or arbitrary or so unreasonable as not to be debatable" (267 U. S., at 517). In all these cases

there was no question of Indian title, no question but that all the lands of Arizona and New Mexico outside of lawful reservations were from the beginning public lands. The view to the contrary made its first public appearance in the complaint that initiated this proceeding.

By all legislation relating to the grant, and all its attendant administration, the correctness of Respondent's construction of the Granting Act is proved. If counsel for the Walapai are right, then Congress and the Chief Executive and all departments under them have been wrong for almost a century, wrong in confirming Respondent's title, wrong in building an Arizona, wrong in not protecting all of Arizona from the white development to which it has been dedicated, and in not preserving it as hunting grounds for aborigines. Fortunately, in this essentially political field, in the respects in which error is alleged, what was done by Congress and by its authority is right.

B. *Congress Did Not Intend by the Act to Concede Walapai Title or Limit Its Otherwise Sovereign Power to Deny the Walapai Possessory Rights.*

We next turn to an analysis of Petitioner's construction of Section 2 of the Granting Act. It is conceded that the Act of 1866 did not *create* a right of occupancy in the Walapai, and did not *recognize* such a right as pre-existing (Brief, 14). It should follow that in determining whether the Walapai ever had such a right, or ever having had it have lost it, the Act of 1866 has no relevance; and yet it is made one of the keystones of the Walapai case.

The Act, counsel say, had the effect of *preserving* and *safeguarding* such rights as the Walapai otherwise had (Brief, 14). In consequence, it is argued, the Act gave the Indians a new sort of right both as against the United States and Respondent. Though generally "It is acknowledged by all that Congress has and always had the consti-

tutional power to extinguish Indian title with or without Indian consent," (Brief, 41) because of the Act granting lands to the Railroad, Congress could not extinguish the assumed Walapai title without (1) expressly modifying or repealing the Act of 1866 or (2) obtaining their voluntary cession (Brief, 81). This theory, based only on the railroad granting act, is given retroactive force; for it is argued that Congress did not, and we assume could not, prior to 1866, extinguish the assumed Walapai rights by offering all lands here in issue for disposal to others, and reserving from such offer, and for Walapai use, the lower Colorado River reservation (Brief, 42-44). Voluntary cession or eminent domain proceedings were apparently necessary, to this theory, even before the Act of 1866. After its passage, nothing short of voluntary cession or express modification or repeal of this Act is deemed to have any effect. Of the whole list of Acts, and the course of administration, which would suffice to negate the existence of any ordinary Indian right to possess, Petitioner considers specifically on the issue here presented only the Act of 1870 (Brief, 84), the forcible removal of the Walapai to their lawful reservation in 1874 (Brief, 87), the establishment of the 1883 "reservation" (Brief, 88), and the 1925 Exchange Act (Brief, 89), and, with respect to each, claims there was no effect on assumed Walapai rights allegedly *based on* or *created by* aboriginal possession, because there was no voluntary cession by the Walapai and no repeal of the Act of 1866.

There is also suggestion that the 1866 Act had the effect of changing the ordinary laws of taking Indian property. Ordinarily, a recognized right of possession at the will of Congress, as distinguished from a legal title vested by Congress, is a right only against third parties, but a mere political claim against the United States that may be disregarded by Congress without liability to the Indians for damages. A vested Indian title, while it may be destroyed

by Congress and the land disposed of to others, is a title the taking of which gives rise to a liability for damages, provided of course Congress sees fit to pass a jurisdictional act. Petitioner, though at times seeming to claim that the Walapai were mere tenants at will of the sovereign (Brief, 40, 41), inconsistently asserts that the Walapai title is of the vested type (Brief, 82), notwithstanding there is nothing to vest a constitutionally protected or other type of title, except the above described construction of the 1866 Act, which admittedly created no right at all. Further, it is of such a vested type that the ordinary process of taking even vested Indian titles can not apply. That ordinary process is for the United States to dispose of the land. Neither it nor the Indians can ever thereafter challenge the title of the United States' grantee. The Indians have a claim, a claim for damages, which may be asserted against the United States, but no claim against the new owner of the land. Cases asserting this type of claim against the United States are cited by Petitioner as proving the Walapai had a right, and that it has not been taken (Brief, 57-8). Apparently it is conceived that the Act of 1866 has both converted the Walapai claim into a vested right for the taking of which compensation must be paid, and limited the power of the United States to take this "vested" Indian right except by voluntary cession, or some other process than the ordinary process employed in taking Indian land.

This structure of argument is too large to be fitted upon its necessary base. That base is the provision of Section 2 of the Act reading:

> "* * * The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

In construing this language, it should not be forgotten that it appears in "An Act granting lands * * *" to the Atlantic and Pacific Railroad Company. It is not in an act having any primary relationship to Indian matters. Considering the well-known fact that Respondent's earned and forfeited lands extend only from Isleta, New Mexico, to the Colorado River, and the further well-known fact that none of the Indians who once "possessed" all this territory, except possibly the Navajo, have ever voluntarily ceded any of it, the net result of the Indians' construction of Section 2 is to prevent the Act from granting lands. The right-of-way, over which is daily transported Government shipments at rates drastically reduced to pay for all these aid lands which were not granted, is likewise, under this theory, exclusively still the property of the Indians.

Although the record does not contain evidence of exact sums which the Government has realized from reduced rates, the Court is justified in knowing they are substantial.[7] True, the Indians have not yet gotten around to claiming this other property; but to Petitioner's construction of the Act, the lands are all still theirs. Was such the intention of Congress? This theory finds no support in an analysis of the words upon which it is spun.

7. *Public Aids to Transportation*, Vol. 2, Government Printing Office, 1938, Table 24, Page 162. It will be noted that the total, to December 31, 1927, is not segregated. The underlying reports furnished by the railroads to the Coordinator gave the figures separately by lines of railroad, including the Atlantic & Pacific. See also Information Bulletin, 1939 Series No. 5, General Land Office, Government Printing Office, 1940. See also House Document No. 583, 75th Cong., 3rd Sess., "Immediate Relief for Railroads":

> "For many years land-grant reductions, usually 50 per cent of the revenue accruing to that portion of the line which is Government aided, have been made on Government traffic. Through an equalization arrangement competing roads make the same reduction on Government traffic in order to participate in the business. The reduction on this account for 1937 is estimated at $7,000,000. For the most part it affects roads in the western district where, as above noted, financial conditions are worst. The increase in Government shipments in recent years has made this reduction from the normal rates assume important proportions. No good reason appears why such reduction should continue. After all, the country must support whatever transportation system it uses. The Government, as a shipper, may well pay reasonable rates. We recommend appropriate amendments to existing statutes to remove the requirement for land-grant reductions."

Textually, the words "The United States shall extinguish" constitute a promise or obligation from the United States to the railroad, and have been held to be such. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 68; *Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 437.

The words "and only by their voluntary cession" are textually a limitation upon the covenant to extinguish, and upon what the railroad could demand of the United States as a matter of right. It is not a limitation upon what the United States can do as a matter of its own volition and power; neither does it vest in Indians any right as against the exercise of sovereign power which they did not theretofore have. The phrase is merely something engrafted on the obligation to extinguish, restraining it and doing nothing else; in short a proviso. (59 C. J. 1087.) "Its grammatical and logical scope is confined to the subject-matter of the principal clause," and, although provisos are "sometimes used to introduce independent legislation, the presumption is that * * * it refers only to the provision to which it is attached. * * * This is emphasized when the proviso is examined in the light of prior legislation, the condition it was evidently intended to correct, and is legislative history." *United States* v. *Morrow*, 266 U. S. 531, 534-5. Accord, *United States* v. *Mullendore*, 35 F (2d) 78, 82 (C. C. A. 8); *Clay Center Bank* v. *McKelvie*, 19 F. (2d) 308, 309-10 (C. C. A., 8).

The proviso did not limit the power of Congress over the Indians or give them rights against the United States. *Gritts* v. *Fisher*, 224 U. S. 640, 648; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Wallace* v. *Adams*, 204 U. S. 415, 423; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88.

So long as Indian wardship continues Congress has full power to do as it wills with Indians and the property used

by them; and all acts of Congress in this respect are completely binding upon the Indians, because the United States acts for them and binds them in a representative capacity, than which there is none more perfect.

It follows that Congress was at perfect liberty, even assuming the Walapai had rights to the lands in issue either before or after 1866, to extinguish that title in any manner and at any time it saw fit. Neither voluntary cession, amendment of the granting act, nor eminent domain, was necessary. On the same assumption, we will demonstrate that the assumed rights have been extinguished, the result being to leave Respondent's admitted fee title unencumbered.

III.

The Intention of Congress Determines Whether Respondent Beneficially Owns the Land, Whether the Walapai Were Given Possessory Rights, and Whether, Assuming They Once Had Rights, They Still Retain Them.

Respondent has asserted that its rights are complete because Congress intended them to be so. The further position will be taken that the Indian claim is only a political or moral claim, because Congress has not intended to give the Indians the legal and justiciable rights asserted for them but has willed that they shall not exist. If Respondent's analysis of the intent of Congress is correct, Respondent prevails, for the Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Art. I, Sec. I.)

Delegated to Congress are all legislative powers relating to the public lands and the Indians (Art. IV, Sec. 3, Cl. 2; Appendix 1, and Art. XI, Sec. 3). Hence, the law

by which Indians are given or denied rights, and if given rights, to what lands such rights are given, and the law by which others acquire and hold rights, must be the law of Congress. Its intent, the fountainhead of all possible legal right, controls. *The Western Maid*, 257 U. S. 419, 432-3; *Carino* v. *Insular Government*, 212 U. S. 449, 457-8; *Barker* v. *Harvey*, 181 U. S. 481, 492; *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472.

As said by Mr. Chief Justice Marshall in *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823), the rule of decision is that which "our own government has adopted in the particular case, and given us as the rule for our decision" (p. 572).

As political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey*, *supra*, *Hayt* v. *United States*, 38 Ct. Cls. 455, *Duwamish et al. Indians* v. *United States*, 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), so withdrawal of recognition evidenced by a grant of lands, inconsistent with Indian right, *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, *Conley* v. *Ballinger*, 216 U. S. 84, *Super* v. *Work*, 3 F. (2d) 90, 271 U. S. 643, by a crowding out of Indians and granting of titles to white people, *Johnson* v. *McIntosh*, 8 Wheat. 543, or even by long acquiescence by Congress and the Executive in the possession of others, *Shoshone Tribe* v. *United States*, 299 U. S. 476, 495-6, *United States* v. *Creek Nation*, 295 U. S. 103, 110, or otherwise, destroys Indian right. "Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review." *Klamath Indians* v. *United States*, 296 U. S. 244, 255. "* * * the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, * * *" *Beecher* v. *Wetherby*, 95 U. S. 517, 525. "These are political, not judicial

powers." *Sioux Indians* v. *United States*, 277 U. S. 424, 436. The titles created by political act are sacred in a court, but only because they have been so created, and only so long as they exist.

Nothing is better established than the proposition that rights to public lands can be acquired only from the action of Congress, and that what Congress has intended, with respect to both the public lands and the Indians, must be enforced.

IV.

The Walapai Have No Legal Rights to the Land in Issue Because They Have Not Been Given Such Rights by Congress or by Its Authority.

The trial court held:

> "3. For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act. Such an act would necessarily be a public one. Not only has plaintiff been unable to produce record of such, or suggest the existence of such, but the researches of the Court fail to show the existence thereof." (R. 192-3.)

The Circuit Court of Appeals said:

> "Since it is conceded that the title of the United States was absolute, except in certain cases of specific grants, and since there is no all-embracing rule governing the possessory rights of the Indians upon the public domain, their rights within the territory ceded by Mexico must be neither more nor less than what the government, whether justly or unjustly, chose to recognize. And that must be determined from the course of governmental action, as contended by appellee. That question we will now consider." (114 F. (2d) 420, 422; R. 207.)
>
> "The rights claimed by the plaintiff on behalf of

> the Indians were dependent upon a recognition thereof by the United States government. They were not recognized." (114 F. (2d) 420, 425; R. 210.)

These holdings are unassailable. The statutes, treaties, and public acts of the Executive, all publicly recorded, are the only possible sources by which the Walapai could have acquired rights to the land. The entire absence of any political act creating any such rights is a controlling defense of the decisions below.

A summary of the policy of Congress prevailing since 1848 appears in IV Kappler, *Indian Affairs, Laws and Treaties*, Senate Document 53, 70th Congress (1929), pp. 1170-71, as follows:

> "In regard to land acquired by the United States from Spain and Mexico, the Indian right of occupancy is not recognized, except where recognized by Spanish and Mexican Governments prior to cession to the United States, or where the United States gave rights to the Indians within these ceded territories by treaty, act of Congress, or executive order, after cession, or by treaty or act of Congress recognized that Indians within these ceded territories possessed such rights of occupancy or possession."

In *Barker* v. *Harvey*, 181 U. S. 481 (1901), the contention was made that some California Mission Indians had Mexican rights, and also possessory rights such as are claimed for the Walapai. Evidence of factual possession was received and stricken from the record. The claim of Mexican right was disposed of on the ground that the Indians had not presented claims before the Court of Claims (Appendix, 10). The claim of possessory right under the laws of the United States was denied because the United States had not chosen to make provision for these Indians, or to recognize in them any right:

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government;

that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. *But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had.* Our attention has been called to no legislation by Congress having special reference to these particular Indians. By the act creating the land commission the commissioners were required (Sec. 16) 'to ascertain and report to the Secretary of the Interior the tenure by which the Mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.' It is to be assumed that the commissioners performed that duty, and that Congress, in the discharge of its obligation to the Indians, did all that it deemed necessary, and as no action has been shown in reference to these particular Indians, or their claims to these lands, it is fairly to be deduced that Congress considered that they had no claims which called for special action." (492; emphasis ours.)

The *Barker* case was followed in *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, as respects claims urged in behalf of Indians as effective, under public policy, to upset political disposition of lands occupied by them. In both cases immemorial occupancy was a basis of claims asserted, and they were denied, in so far as the laws and policy of the United States were relied upon as creating

rights coincident with factual occupancy, because the United States had done nothing for such Indians. By the same token, factual occupancy of the Walapai, if any can be proved, never was transmuted by political action into legal right.

The experience of the Court of Claims entitles its opinion on Indian matters to great respect; and it has repeatedly announced the doctrine of the *Barker* case. In *Hayt* v. *United States*, 38 Ct. Cls. 455, the issue was whether certain country occupied by the Utes was Indian country. The Court said:

> "A country inhabited by Indians does not necessarily make such country Indian country within the meaning of the statutes. The status of such country must be determined with reference to the aboriginal claim arising from occupation and the recognition given by the government to the right accompanying possession." (p. 457.)
>
> "It became Indian country when the United States set apart a reservation, and not until then, and to the extent of reservations assigned to them only." (*Ibid.*, 464.)

In *Duwamish et al. Indians* v. *United States*, 79 Ct. Cls. 530, certiorari denied, 295 U. S. 755, determining that certain Washington tribes had never been accorded any rights to lands claimed, the Court of Claims sustained the Government in the following position:

> "'* * * the Government never having recognized that these tribes were the possessors of title in any degree to the land now claimed by them, they have no right thereto which can be litigated in this or any other court: that whether or not an Indian tribe has title to any particular section is dependent in the first instance upon sovereign recognition and that until that recognition has been accorded by the sovereign the entire matter rests in the realm of politics and is not determinable in a court of law or equity.'" (p. 597.)

The Court of Claims held that rights are politically created; they do not exist in law. Without political recognition, there can be only political claims, or political considerations, not cognizable in a court (pp. 598-9). The "issue is a political and not a judicial one." (p. 600.) "Right of occupancy" has been a "cardinal principle" of legislation; but the courts can not apply it when Congress has not (p. 608). The President's veto of the Chippewa jurisdictional bill, May 10, 1934, Executive Document 179, 73d Cong., 2d Sess., is quoted. In part it reads:

> "'* * * Recognition of Indian title is a purely political matter and can be accorded solely by the sovereign. Section 4 of this act might fasten upon the United States liability for the payment of the value of land which they had never recognized as belonging to these particular Indians solely because some official of the United States, minor or otherwise, had "recognized" title and occupancy by long possession as being in these particular Indians.'" (p. 599.)

Writ of error was denied in the *Duwamish* case by this Court, 295 U. S. 755. See also *Coos Bay Indian Tribe et al.* v. *The United States*, 87 Ct. Cls. 143, 152-3, certiorari denied, 306 U. S. 653.

A bill similar to the vetoed bill considered in the *Duwamish* case (a bill that would have recognized the theory that Indians of the Mexican cession had legal rights coextensive with possession, and because thereof) was passed by the 74th Congress, presumably upon the representation of Indian Commissioner Collier that possession gave legal right.[8] It was vetoed by the President after conferences

8. Mr. Collier testified:

"The proposed act, this bill, would definitely recognize that the loss by the Indians of those lands 'to which they had title arising from occupancy and use without just compensation therefor is sufficient ground for equitable relief'—that is not the enunciation of a wholly new principle. The Supreme Court has declared that the right of occupancy is as sacred as the fee and cannot be extinguished without compensation. In this case it was, but here we get a declaration. And the bill would direct that for all such lands lost, the Indians should be paid a minimum of $1.25 per acre or a maximum which

with the Departments of Justice, Treasury, and Interior, because Indians of the Mexican cession have no rights except those politically created for them in reservations; and in 1937 Commissioner Collier found it necessary to repudiate his previous testimony and correctly to describe the result of law and administration in the Mexican cession as according no rights to Indians outside of reservations. (R. 99-109).

In the entire course of this case, Petitioner has been unable to point to or suggest any single act of the Congress, or any single act of any executive officer acting pursuant to authority delegated by Congress, vesting in or purporting to vest in the Walapai Indians a title of any kind in and to the lands herein in issue.[9] The overwhelming mass of legislation and administrative action which negative the possibility of any such acts having been taken will be subsequently reviewed; here, the point we stress is that unless it affirmatively appears by the pleadings and by the public records of the United States that the United States has created some right such as is attempted to be maintained in the Walapai Indians, superior to the aboriginal confirmed rights of Respondent, no such right exists.

From the foregoing it appears that when this Court has been confronted, as it is confronted in this case, by a tribe which has not been granted rights by the Legislative Department of the Government this Court has refused to assert that such rights exist. There is, therefore, no uni-

would represent the actual value of the lands at the time lost, 'as classified under the public and mineral land laws of the United States.' Later on the report touches on that. Additional compensation is decreed, equalling the value of certain services and goods which were promised in the unratified treaties, but this factor is negligible in the total result." (California Indians Jurisdictional Act, Hearings before the Committee on Indian Affairs, United States Senate, Seventy-fourth Congress, First Session, on S. 1793, Government Printing Office, 1935, p. 7.)

9. The unsoundness of Petitioner's argument in this Court, entering upon the extension to Arizona of the Indian intercourse laws, "or such provisions of the same as may be applicable" by the Act of 1851 (Appendix to Petitioner's Brief, 7-8), will receive detailed attention later (*infra*, pp. 88 to 94).

form course of judicial decision establishing the contrary doctrine as claimed by the Petitioner. Examined on their facts, and analyzed for their precise holding, no cases cited by Petitioner sustain its claim.[10]

V.

Legislation and Administration Have Confirmed Respondent's Full Beneficial Ownership and Have Affirmatively Denied to the Walapai All Right to the Lands in Issue, and

VI.

Any Rights the Walapai May Ever Have Had to the Lands in Issue Have Been Extinguished.

A. *Preliminary Statement.*

After holding that no rights had been created for the Walapai, the trial court concluded his third finding as follows:

> "3. • • • Further, the sources and authorities cited by defendant in its points and authorities, Points ID, IE and IF (R. 33-66), show beyond possibility of challenge:
>
> "(1) that it was not the policy of the United States to accord these Indians any possessory or other right because of any alleged occupancy claim;
>
> "(2) that their only right was to such reservations as were lawfully established for them, viz., the lower Colorado River reservation established by statute in 1865, and the even but not the odd-numbered sections of the Walapai reservation established by executive order in 1883;
>
> "(3) that the lands of Arizona were from their acquisition public domain open to sale and grant; and
>
> "(4) that the Congress intended to grant and did grant to the Atlantic and Pacific Railroad Company,

10. For analysis of cases cited by Petitioner, see *infra*, pp. 78 to 88.

to whose rights defendant is successor, the lands here in controversy, except such as were reserved or disposed of to settlers, or subject to lawful claims or rights, prior to March 12, 1872, as a means of opening the country to white development and solving the corollary problem of subduing and controlling the Indians. Plaintiff's theory of public policy directly contradicts the public policy announced by every act of Congress relating to the problem and the actual course of administration by the executive branch pursuant to lawful authority. The Court's conclusion in this respect has been in part drawn * * *"

The next finding is that the long and emphatic political negation of Walapai right, which is the basis for the finding that the affirmative policy of the United States was not to create any such right, would be a withdrawal of any recognition of right that could have existed and consequently a destruction thereof. The finding reads:

"4. Had there been any rights in these Indians such as plaintiff asserts for them, there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive pursuant to sovereign political prerogative, in such time and manner that the existence of such rights would not have interfered with the attachment of the railroad title. I have arrived at this conclusion from the sources and authorities referred to in support of its point II (R. 67-73) by defendant."

The Circuit Court of Appeals held:

"The Acts above enumerated, it will be observed, were all enacted prior to 1872 when the Railroad Company's rights in the land grant vested. These statutes recognized no rights of the Indians in Arizona other than those existing under Mexican law or created by reservations after the Mexican cession to the United States. These rights did not include possessory rights of Indians. No other Acts of Congress recognized such possessory rights. The rights claimed by the plaintiff on behalf of the Indians were dependent upon a recog-

nition thereof by the United States government. They were not recognized. Even if such rights were recognized and thus given substance they would be extinguished by later non-recognition" (114 F. (2d) 420, 425, R. 210).

"We conclude that evidence of which the courts take judicial notice which cannot be affected or overcome by testimony of possession, shows that the Walapai Tribe of Indians in Arizona have no recognized right of occupancy of public lands other than in reservations set apart by the government for the tribe; that this right in the reservation set apart by Presidential proclamation in 1883 is subject to the prior vested right of the appellee to the odd-numbered sections of the grant within the reservation; that the decree should be affirmed as to land in controversy both within and without the reservation" (114 F. (2d) 420, 426, R. 212-13).

The propositions here argued, and the findings of the courts below which they support, are justified by the same history of law and administration, and will be discussed together. In this discussion, we will take into account, as did the courts below, only publicly recorded Acts of Congress and the Executive, and such other matters of public history, as are not open to dispute. By this process we will seek to demonstrate the controlling will of Congress, determined from its acts and acts performed pursuant to its authority.

B. *The Public Land Laws and Their Administration Deny Walapai Right and Confirm Respondent's Beneficial Ownership.*

The territory ceded by Mexico in 1848 was, with the exception of the relatively few spots where Spanish-Mexican civilization had gained a foothold, entirely in the "possession" of the Indians. The maps and tables in the Eighteenth Report of the Bureau of American Ethnology

supply the details of this generally known condition. Except for the Pueblos, and a few other agricultural groups, this "possession" was simply that of savages such as the Walapai. The treaty of cession obligated the United States to avoid provoking, and if need be forcibly to restrain all incursions of such savages into Mexico (Art. XI, Appendix, 4; see also Trist's explanation, Appendix 7); for their type had been to the Spanish the scourges that they became to American civilization. This article "shows the character of the country. Most of it was in a wild state of nature." *Botiller v. Dominguez*, 130 U. S. 238, 244. Petitioner agrees that this Article was applicable to the Walapai and was an obligation to Mexico, but argues that the protection promised Mexico was a guarantee of "protection to all Indian tribes with respect to their original homes." (Brief, 48.) We invite attention to the language of the treaty itself, and particularly to the language indicating that the parties to it contemplated that the United States would "provide for the removal" of Indians from the ceded territory, and "for its being settled by Citizens of the United States." These contemplations were completely fulfilled in so far as the Walapai are concerned. Article IX and the protocol (Appendix, 3, 5) foreshadowed the laws later enacted protecting only grants in the ceded territory.

After the cession, the United States, with respect to Indians without grant, was free to create or withhold legal rights, and granting them, to define and limit them. Legal protection was never extended to Indians of the Mexican cession by statute in the manner of statutes for some other territories (Appendix, 75-76). With few exceptions, treaties were not made with such Indians in the ceded territory. None was made in California, Arizona, or western New Mexico. Possessory claims based upon "aboriginal occupancy" were not recognized; and Indians were generally

given reservations, created by statutes and executive orders, which were the measure of their legal right.

The legal status of Arizona lands was a question approached gradually, but the resulting policy is not in doubt. General Kearney realized that Pueblos held grants; and, with subsequent ratification by the Territorial Legislature, he incorporated these communities and gave them legal power to protect their lands (Appendix, 8). This law held the germ of the land policy finally adopted, namely, to respect Mexican and Spanish grants to Indians and others, to treat all remaining lands as public lands open to disposition, and to place Indians without grants upon reservations—lands reserved from sale and other disposition for their use.

This policy was not worked out for New Mexico (Arizona) by 1850; but the creation of a territorial government in that year indicated the direction the formation of policy was taking (Act of September 9, 1850, 9 Stat. 446; Appendix, 9). The Government was granted legislative power over the lands here in issue, and others like them, such power as is not had by states and territories in "Indian country," where Indians have dominion over the soil and enjoy varying degrees of autonomy, and where the intercourse laws are supreme. This act also granted two sections in each township for school purposes.

The land policy which came to be adopted in Arizona was first clearly formulated in California; it was the most developed part of the ceded country. Its gold deposits attracted many immigrants. William Carey Jones was sent to gather information upon the problem, then pressing in California, of what private rights existed which the United States was bound to respect, to the end of ascertaining the lands which were "public" and subject to disposal. He made an elaborate report on the Spanish-Mexican grant system, and stated that "In the wild or

wandering tribes the Spanish law does not recognize any title whatever to the soil." (S. Doc. No. 18, 2nd Sess., 31st Cong., Vol. 3, p. 34; R. 33.) Legislation promptly followed. For California, already, since September 9, 1850, a state upon an equality with other states (Donaldson, *The Public Domain*, 442), Congress passed an act to ascertain and settle the private land claims (March 3, 1851, 9 Stat. 931; Appendix, 12). The object was to determine the extent and boundaries of privately held lands, separating them from all other lands, which it was the purpose of Congress to offer for disposition under granting and preemption laws, with the exception of such "reservations" as might be created by it or its authority. *Newhall* v. *Sanger*, 92 U. S. 761; *Barker* v. *Harvey*, 181 U. S. 481.

> "All of the area of California became public domain, except certain grants made by sovereigns and governments, former owners of the soil, and was and is surveyed and disposed of under laws of the United States." Donaldson, *The Public Domain*, 443.

In this year 1851, mistaking as do counsel for the Walapai the policy of Congress, Indian Agents negotiated Indian treaties by which California Indians purported to cede legal possessory rights to certain lands and retain such rights to other lands not ceded. In 1852, these treaties were rejected because the Indians of the Mexican cession had no legal rights to any land which they could cede (R. 35-6, 99-109).

The land policy for California was concretely applied to Arizona by the Act of July 22, 1854 (10 Stat. 308; Appendix, 19). By this Act, eight years before the passage of the general homestead donation law (Donaldson, *The Public Domain*, 332), Congress rewarded past and encouraged future settlement in the territory by granting 160 acres to every settler who would live upon and improve the land. Every acre here involved, except specified reservations such as school lands granted, saline lands, lands

which might be covered by Mexican and Spanish claims, and lands otherwise reserved, was given or offered as a gift to settlers. Lands not "taken" under other provisions were made subject to the preemption law of 1841 (5 Stat. 453, c. 16). Extensive additional land grants were made to the State for school and other public purposes.

This same act of 1854, in dealing with Kansas and Nebraska lands, made no donations; and only lands *the Indian title to which had been or should become extinguished* were made subject to preemption. The contrast emphasizes what is otherwise not debatable, namely, that Congress did not respect any Indian claim to the lands here in dispute, none of them "reserved" in 1854 or since. The act has been authoritatively applied by both Congress and the Executive ever since its passage in accord with this policy. Thus, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, instructed the Surveyor-General of New Mexico on August 21, 1854, with reference to his duties under the Act of 1854, as follows:

> "It is obligatory on the Government of the United States to deal with the private land titles, and the 'pueblos,' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns." Donaldson, *The Public Domain*, 398.

All subsequent legislation which we will examine confirms our construction of the Act of 1854. As stated by Donaldson, at page 456 of his work above cited, "all of the area of Arizona is public domain, except certain grants made by sovereigns or governments, former owners of the soil, and is surveyed and disposed of under the laws of the United States."

Counsel for the Indians make an argument in this con-

nection. Section 7 of the Act of 1854 is said to have *extended* Section 10 of the Preemption Act of 1841 to Arizona. Because the Preemption Act applied only to lands the Indian title to which had been extinguished, Petitioner argues that the Act of 1854 confirmed "the existence of rights of occupancy in the tribes of the Mexican cession area." (Brief, 40-41.) By saying the Act of 1854 was "extended," Petitioner is able to avoid the language of Section 7 of that Act, which is "that any of the lands not taken under the provisions of this act *shall be subject to the operation of* the preemption act * * *" (Emphasis ours.) Accordingly, to Petitioner, all lands in Arizona (because all were "occupied" in some sense by Indians from time immemorial) *were declared by Congress to be not subject to the operation of the Preemption Act of 1841;* and the inference is that this Section 7 likewise effects an emasculation of Section 2, which, in terms of present grant, provided that: "To every white male citizen of the United States" who met certain qualifications of citizenship and residence in the territory "there shall be and hereby is donated one quarter section or 160 acres of land."

The Act of 1854 was not an "offer * * * of Indian lands." (Brief, 41.) It was not "authority to the Secretary of the Interior to donate Indian lands." (Brief, 42.) It was the express enactment by Congress that all lands in Arizona were public lands subject to donation, preemption, and grant, and that the only exceptions to the operation of the public land laws were to be the reservations which had been or might be created by lawful authority. There could be no plainer Congressional declaration that Indians did not have exclusive rights of possession, outside of reservations, and should have no rights against any of Congress's grantees, present or future.

The Senate applied the theory of the 1854 Act to Utah

in 1863, by amending a treaty that had been negotiated with the Tabeguache Band of Utes to indicate the purpose of the Government not to recognize any rights in the Indians, or to create any outside reservations, but to Americanize the whole Mexican cession. *Hayt* v. *United States*, 38 Ct. Cls. 455.

In 1857, Congress sent Captain (Lieutenant) Sylvester Mowry to ascertain and report, as William Carey Jones had reported with respect to California lands, what private titles were to be respected and what lands were public and open to disposition by Congress in the Gadsden Purchase. He made a report that under Spanish and Mexican law "The country occupied by the wild tribes was expressly declared to be public domain." (H. Ex. Doc. 2, 35th Cong., 1st Sess., pp. 584-93.)

In the Report of the Secretary of the Interior for 1860 (S. Doc. 1, 36th Cong., 2nd Sess.), transmitted by the President under his lawful duty to make annual accounting of his stewardship, he interpreted the laws and described the result of their application as follows (R. 34-5):

> "In California the Indians have not been recognized as holding any specific tracts of country; but have been collected and transferred to reservations set apart for their protection * * *." (At p. 51 of the Report.)
>
> "With the wild tribes in the heart of the Continent, in Arizona, and in California * * * we have no treaties whatsoever * * *." "* * * the government is free to pursue such a policy as circumstances may render expedient." (pp. 34-6 of the Report.)

In Arizona,[11] Congress reserved to itself the denial and confirmation of all claims under Spanish or Mexican grants until 1891. Meanwhile, all lands covered by such claims, valid or invalid, were reserved from disposition as public

11. Arizona was created as a separate Territory, February 24, 1863. The laws of New Mexico were carried forward (12 Stat. 664; Appendix, 24). *Tumacacori and Calabazas Grant* 16 L. D. 408.

lands under the Act of 1854, together with saline lands and such other "reservations" as were made by authority of Congress. Land offices were established. (R. 40.) Surveys were begun. (R. 40, 42.) Activities of this sort are not engaged in in Indian country. In 1870, the Surveyor General was instructed to "ascertain and report upon the origin, nature, character and extent of the claim to lands in said territory under the laws, usages, and customs of Spain and Mexico." (July 15, 1870, 16 Stat. 291, 304; Appendix, 41.) The Act of March 3, 1891, creating a Court of Private Land Claims (26 Stat. 854; Appendix, 51), carried forward Congressional purpose to carve from lands of the Mexican cession open to disposition only lands held by titles which the United States was bound to respect. Section 6 provided:

> "That it shall and may be lawful for any person * * * claiming lands * * * by virtue of any such *Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico* to the United States which at the date of the passage of this act have not been confirmed by the act of Congress, or otherwise finally decided upon by lawful authority, *and which are not already complete and perfect*, in every such case to present a petition, in writing, * * *." (Emphasis ours.)

That Congress in this Act of 1891 provided that confirmations thereunder should not interfere with just and unextinguished Indian titles did not, as Petitioner argues (Brief, 91), demonstrate that possession in fact had by the laws of the United States ripened into title everywhere. It simply indicated that there were Indian titles in Arizona at that time, without itself creating new ones or attempting to define the old. What such titles were, in whom vested, and to what lands, had already been determined by other laws. Thus, under all previous legislation, and all that followed 1891, no Indian claim based only on

possession in fact was recognized as of legal right; because in the land policy of Congress all the land was offered for disposition except reservations; and the only reservations made in the interest of Indians were, *first*, lands granted to some by Spanish and Mexican grants, and, *second*, lands in reservations created for Indians by the United States.[12] In *Lockhart* v. *Johnson*, 181 U. S. 516 (1901), the Supreme Court said of the legislation beginning with the Act of 1854 and ending with the Act of 1891:

> "Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an Executive withdrawal under such authority, either express or implied." (p. 520.)
>
> "Whatever reservation there is must be looked for in the statutes of the United States * * *." (p. 523)

This land policy resulted in the institutional organization of Arizona. The tax resources, the proprietary interests, and the political power, of the Territory and State, were vitally affected by the extent of "Indian country." White properties could not be developed where Indians held complete beneficial ownership of the soil; white men could not acquire taxable ownership of such lands; and political government thereof was predominantly by the Indian intercourse laws. That Arizona, outside reservations, was not "Indian country" is confirmed by the Enabling Act (June 20, 1910, 36 Stat. 557; Appendix 62) and the State Constitution (Appendix, 64). How counsel for the Walapai can claim from these two laws aid to their case, as they do without explanation (Brief, 91-2), is not understandable; for they are precisely destructive of every

12. The Executive orders creating and changing Indian reservations in Arizona between 1855 and 1912 cover 34 printed pages (Executive Orders Relating to Indian Reservations from May 14, 1855, to July 1, 1912. Government Printing Office, 1912, pp. 3-37).

claim asserted for the Walapai. The Enabling Act required Arizona State to disclaim all power, proprietary and political, to

> "* * * all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, * * *"

and provided that the United States retained full proprietary and political power to such lands "until the title of such Indian or Indian tribes shall have been extinguished."

Article XX, Section Fourth, of the Constitution gave the required disclaimer. Accordingly, "Indian country" in Arizona is composed entirely of lands granted Indians by a prior sovereign or reserved to their use by the United States.

The fact that the reservations created excluded so much wealth from taxation prompted Congress to force under taxation as rapidly as possible lands outside reservations. We will later review (*infra*, 62-3) the manifestation of this policy toward the lands here in issue. The policy to create new and preserve old taxable wealth, to sustain Arizona institutions, was for a long time threatened with frustration by the habit of the Indian Department constantly to add undisposed of public lands to Indian reservations by Executive order. This issue was settled by the Act of May 25, 1918 (40 Stat. 561, at 570, Title 25, Sec. 211, U. S. C. A.; Legislative history, R. 120-125), providing:

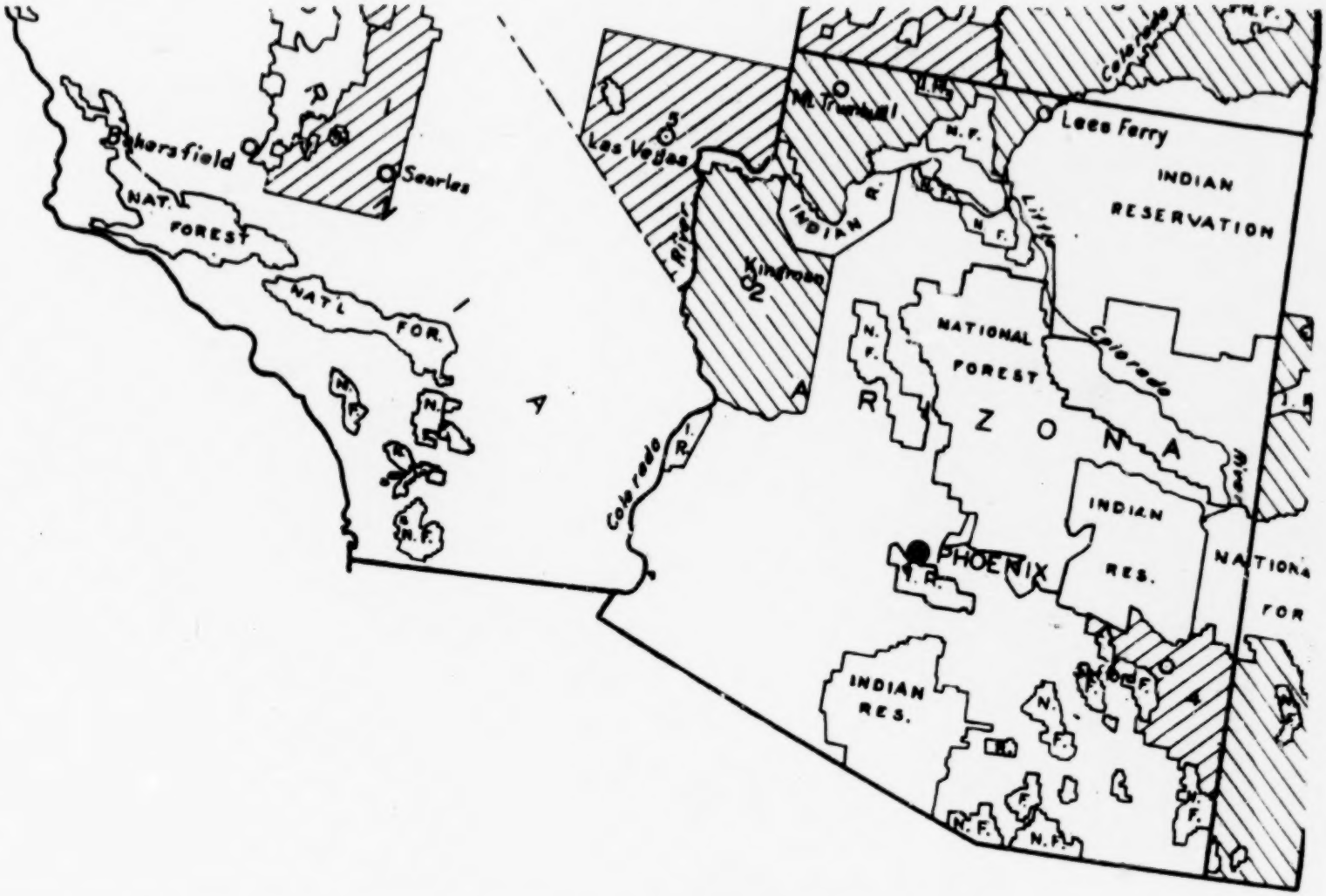
> "That hereafter no Indian reservation shall be created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

Thus did Congress assure that Indian rights should be confined to existing reservations, and prohibit what is sought to be accomplished in this action.

Administration was from earliest times a faithful ap-

plication of Congress' land policy. In his reports to Congress of his stewardship, the President transmitted the yearly reports made to him by his Interior Department agencies. Congress was told that Indian possessory claims were being ignored (R. 34-36), and that (1) the Indians of Arizona were not treated as having soil rights, but as pensioners on the national bounty who were required to remain on the reservations assigned to them; (2) that the whole territory outside the Spanish-Mexican grants and the reservations was open to sale and grant; and (3) that the coming of the railroad was eagerly awaited as bringing deliverance from Indian hostility, and a rapid exploitation of the country by white settlers (R. 42-53). These applications of legislation, interlaced and followed as they were by legislation confirming previous legislation and administration, leave no doubt of the correctness of our interpretation of public land policy, convert it indeed into the status of a rule of property.

Administration by the present Secretary of the Interior of second cause of action lands and of such even-numbered sections as are privately owned, is administration of them as privately owned lands only; and the undisposed of even numbered sections are administered as "vacant, unappropriated, and unreserved lands" of the public domain, all under the Taylor Grazing Act (Appendix, 69). There is no challenge of the political power of Arizona. Moneys received are divided with Mohave County. The whole scheme is administration of all these lands for the benefit not of Indians but of others. Attached hereto is a reproduction of the map appearing at page 11 of the *Grazing Bulletin* for January, 1937, in so far as the same relates to Arizona. The location of the forest preserves and the Indian reservations, the location of the Taylor Act grazing district, and all other information on this map is a summation of the history of the land laws



- ● FIELD HEADQUARTERS AND REGIONAL OFFICE ALSO REGIONAL OFFICE REGION 2
- ● REGIONAL OFFICE
- ▨ ESTABLISHED GRAZING DISTRICTS
- ▭ PROPOSED GRAZING DISTRICTS
- ——— REGION BOUNDARY

N.F. NATIONAL FOREST

I. R. INDIAN RESERVATION

and their administration which have denied the Walapai all rights outside of the lawful extent of their reservation.

C. *The Concrete Application of the Will of Congress to the Walapai Has Denied Their Alleged Rights and Confirmed Respondent's Beneficial Ownership.*

Settlers responded to the invitation of Congress, and by the 1860s, particularly in mining settlements, were encroaching upon the Walapai. In 1864 Arizona's first Indian Superintendent, Poston, met with the chiefs of the Walapai and other Colorado tribes; and in recognition that they had no soil right, and needed a home upon lands reserved from the operation of the land laws, for their use, he agreed to recommend to Congress, and the Walapai and others agreed to accept, a reservation at Half-Way Bend, south of the lands here in controversy (W. P. 33, R. 130-32).

In 1865 Congress appropriated $20,000 to assist the Indians to "locate in permanent abodes," etc., and provided:

> "All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries." (13 Stat. 559.)

The use by Congress of the term "reservation" is conclusive that the Walapai had no recognized right elsewhere, and that all lands outside the reservation, both before and after 1865, were "public"; for the term *reservation* "is used in our land law to describe any body of land * * * *which Congress has reserved from sale* * * *." *United States* v. *Celestine*, 215 U. S. 278, 285 (emphasis ours). "Whatever reservation there is must be looked for in the statutes of the United States," *Lockhart* v. *John-*

son, 181 U. S. 516, 523. The laws for the disposal of all Arizona lands outside reservations had been in effect since 1854. On July 27, 1866 (14 Stat. 292; Appendix, 27), Congress sold to the Atlantic and Pacific Railroad Company, to whose rights Respondent is successor, the lands involved in this litigation.

The position of counsel for the Indians with respect to the 1865 reservation is difficult of appraisal. Three times Indian Superintendent Poston's dealings with the Indians are characterized in substance as being the promises of a politician running for Congress (Brief, 44, 99). The Walapai were not voters (Appendix 26). There is nothing in Poston's record to justify the innuendoes raised against him. In 1865, as territorial representative, speaking on the appropriation bill which created the Walapai reservation, he related his discussions with the Indians. Nothing rebuts the presumption that he was honest and conscientious. His relation is a uniquely trustworthy and significant contemporaneous account of what occurred.[13]

The 1865 reservation, counsel for the Indians assert, was not representative of an agreement on the part of the Indians (Brief 44). The point is not important, because

13. Petitioner gives a partial quotation of what Mr. Poston said as territorial representative. A more complete rendition is helpful:

"• • • I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and head men of the Yumas, Mohaves, Yapapias, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave • • •

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of a written treaty, which has been heretofore so severely criticized in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds

the Act of 1865 did not purport to be an agreement. It was an act of Congress reserving from white occupation and disposition under the public land laws certain lands for the use of the Walapai. Walapai consent to it was not essential, although it was given; Walapai rebellion had no effect upon it as a definition of their legal rights. It is worthwhile in passing to note that this Act was passed eleven years after all of Arizona outside of reservations had been thrown open to sale and grant, and one year before the lands here in question were granted to Respondent.

Lack of funds prevented removal of the Walapai to their reservation. In September, 1865, Superintendent Leihy wrote from the reservation indicating they had not yet arrived (W. P., 37). The Commissioner of Indian Affairs was quoted to Congress in his report for 1866 as follows:

> "Plans to colonize the tribes known as the River Indians, the Yavapais, Hualapais, etc., upon a reservation on the Colorado river set apart for them by Congress two years ago, have been considered and presented to the department, but for want of necessary funds, nothing of a permanent character has been done." (W. P., 36.)

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and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and Arizona. These Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians in their ignorance, are not able to understand." (R. 130-32.)

In June, 1867, the agent at La Paz indicated that lack of funds and hostilities stood in the way of bringing the Walapai to their reservation (W. P., 41). The "Indian outbreaks" were causes "retarding the prosperity of the territory" and hampering surveys of the "public land to be disposed of"—72,906,304 acres, all of Arizona (R. 42).

In 1869, the Commissioner of Indian Affairs reported (House Exec. Doc. I, Part 3, 41st Cong., 2d Sess.):

> "*Colorado River reservation*, selected in 1864, stretching on the river from Corner Rock to Half-Way Bend, is estimated to contain seventy-five thousand acres of public domain, and upon which it was proposed to colonize about ten thousand Indians of various tribes. The Indian title to lands in the Territory ignored, and difficulties ever increasing between them and a rapidly growing population of persons from other quarters, rendered it necessary that some provisions should be made for the original inhabitants."

The Walapai presence outside their reservation continued in fact, though not as of legal right. Between 1866 and 1869, the troops of the United States waged war to subdue them and protect white settlers (W. P., 36-93). Between 1869 and 1874, they were under military surveillance. Bancroft, *History of Arizona and New Mexico*, pp. 561-3; 9 *New Mexico Historical Review*, pp. 174-5, 181. In 1871, Vincent Colyer, representing the President, ordered them fed at Beale Springs until it could be ascertained where they could be placed without interference with white exploitation of the territory (W. P., 93). He apparently did not realize Congress had given the Walapai a reservation. On November 9, 1871, General Sherman, by direction of the President, instructed General Schofield with respect to the Apaches of Arizona:

> "The Secretary of War wishes you to give all the necessary orders to carry into full effect this policy, which is the same that prevails in the Indian country

generally, viz., to fix and determine (usually with the assent expressed or implied of the Indians concerned) the reservation within which they may live and be protected by all branches of the Executive Government, but if they wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile. * * * At all events, these Indians must have a chance to escape war, and the most natural way is to assign them homes and to compel them to remain thereon * * *."

"The citizens of Arizona should be publicly informed of these events, and that the military have the command of the President to protect these Indians on their reservations, and that under no pretense must they invade them, except under the leadership of the commanding officer having charge of them." (*Executive Orders Relating to Indian Reservations, May 14, 1855, to July 1, 1912*, Government Printing Office, 1912, pp. 33, 34.)

General Howard in 1872, with power from the President, disestablished the Beale Springs feeding post and ordered all Indians to go to their reservations. See *New Mexico Historical Review* and Bancroft, *op. cit., supra.* On March 6, 1872, President Grant wrote General Schofield, under whose military jurisdiction the Walapai fell:

"Indians who will not put themselves under the restraints required will have to be forced, even to the extent of making war upon them, to submit to measures that will insure security to the white settlers of the Territories.

"It is not proposed that all the protection shall be to the Indians, but that, if they will submit to rules and limitations laid down for them, protection by military force shall be mutual." (H. Ex. Doc. No. 1, Part 5, 42nd Cong., 3d Sess., p. 545.)

The Walapai were transported to their reservation in 1874, ran away a year later (W. P., 96-114).

What was done in this interval 1865-1874 was done by authority of Congress and with its knowledge. It appro-

priated the moneys for the campaigns, and from year to year received reports as to the progress made. The purpose of the legislation and the purpose of the campaigns was to force the Indians to go to the homes provided for them by Congress and not, as counsel for the Indians maintain, to confirm them in their claims to possess all of Arizona. Counsel for the Indians even assert that the very fact that Congress appropriated moneys for the Walapai signified "a settled purpose to fix the Indians in their country, by giving them security at home." (*Worcester* v. *Georgia*, Brief, 92.) The settled purpose toward the Cherokees, to which the Court referred, was manifest in acts directly relating to them. Congress, in appropriating for the Walapai, has expressed, as it has in other legislation, quite a different purpose, leaving no ground for speculation. The 1864 and 1865 appropriations were to assist the Indians "to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." (13 Stat. 180, and 13 Stat. 559.) The 1867 appropriation in the sum of $7,000 was for the same purpose, and an additional appropriation in the sum of $50,000 was made "for expense of collecting and locating the Colorado River Indians in Arizona on a reservation set apart for them." (14 Stat. 512, 514-15.) In 1868, 1869, 1870, and 1872 appropriations were made to assist the Indians to locate in permanent abodes and sustain themselves by the pursuits of civilized life.[14] In 1872 occurs the following additional appropriation: "*Collecting and locating the Colorado River Indians in Arizona.*—For completing the construction of the irrigating canal on the Colorado reservation in Arizona, $20,000." (17 Stat. 188.)

The 1876 appropriation act provided:

> "Sec. 2. That no supplies or annuity-goods for which appropriation is made in this act shall be issued to any band or tribe of Indians while the same may be

14. 15 Stat. 219 and 222; 16 Stat. 36, 357, and 556; 17 Stat. 187.

> engaged in hostilities against the United States or in depredations upon settlers: nor shall any sum of money appropriated by this act for any tribe of Indians for whom a reservation of territory shall have been made be paid to them or expended for their benefit, unless such tribe and the warriors thereof shall remain peaceably within the limits of the territory assigned to them unless absent by the consent of the agent." (19 Stat. 176, 199.)

These appropriations were only a few incidents in the numerous acts of Congress and of the Executive indicating a harmony between Congress and the officials charged with administering the laws. Petitioner has selected a statement by the Commissioner of Indian Affairs in his report of 1872 (Brief, 53) to the effect that the Government has never recognized any distinction between Indians living on territory ceded by Mexico and those upon territory ceded by Great Britain, France, and Spain. It may be true that no difference between Indians was recognized, but it is very clear that a policy was applied with respect to Indian land rights, which resulted in the Walapai never acquiring land rights in the same way that some Indians in other territories, notably east of the Mississippi River, had acquired them. The very fact that no treaty has ever been made with the Walapai, whereas treaties were the almost universal practice in early days, indicates a difference.

We accept the challenge raised by Petitioner's citation of the Report of the Commissioner of Indian Affairs for 1872. It is a part of the Report of the Secretary of the Interior, which is, in turn, a part of the President's report to Congress for that year. It is published as House Executive Document No. 1, Part 5, 42nd Congress, 3d Session. Excerpts appear in Appendix, 112.

It is not to be doubted that the Indians of the Mexican cession were no different from the Indians of other portions of the country, in the sense that all Indians are primi-

tive culturally and under guardianship politically. What had changed was the relative strength of the United States and its Indian wards. A new policy born of strength was applied to them and to other Indians to the end of promoting white settlement.

From the foregoing it is very clear that all of Arizona outside of reservations was regarded as free of Indian claim or right and open to disposition and grant by the United States. The whole of public policy was directed to the hastening of settlement, and one of the means adopted was the construction of the railroad under the act of 1866, to the end of making effectual the policy of the United States as against the very claims counsel now assert in behalf of the Indians.

After the Walapai were transported to their reservation, and after they ran away, Governor Stafford reported Chief Cherum's assurance that the Indians would not "steal from nor murder white men any more" and desired to "live in peace among the white men and make their own living by working for them, and by hunting and gathering • • •" (W. P. 104-5). After considerable discussion it was decided not to risk war by forcing them back (W. P. 106-13).

By this time "the country formerly occupied by them was settled up" (petition of ranchmen to General Kautz, W. P. 115). Surveys were made, and land offices opened for disposal of the lands. The extension of settlements under protection of troops, the disappearance of game, and the coming of the railroad which would "multiply four-fold the striking force of the army in that section," were reported to Congress as forces to accomplish the policy of further breaking the already partly broken Indian monopoly (*e. g.*, R. 45-7).

Thus recurred the old story of white penetration, crowding out Indian possession, not recognized as being a possession in legal right. The soil was parcelled out by the

sovereign "and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." *Johnson* v. *McIntosh*, 8 Wheat. 543, 590-91 (1823). "It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it" (at 589).

After 1875, all the water and grass was taken by white stockmen (W. P. 126, 131); and very quickly the game entirely disappeared (W. P. 130-32). The Walapai worked for settlers and the railroad while not "lying around the railroad stations and small towns" (W. P. 148), and were saved from starvation during the winter months of 1879 and subsequent years by government feeding (W. P. 130-31). In 1881 they represented to Colonel Price:

> "* * * that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still time; that the land can never be of any great use to the Whites; that there are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising" (W. P. 134-5).

In this there was evident a complete lack of any Walapai claim of any right to any land, a perfect recognition that they had neither possession nor right thereto, and a desire to be given rights.

A white settler even had Peach Springs, on first-cause lands (W. P. 141).

A military reservation was recommended by Genera Willcox on July 8, 1881 (W. P. 135-6); an Executive orde was issued by President Arthur, January 4, 1883, directin that a tract be reserved for occupancy of the Walapa Indians (W. P. 146; this tract includes the first cause o action lands). The tract was not suited to Walapai needs and not occupied by them. (See report of General Crook W. P. 147-8.)

In 1884, Captain F. E. Pierce was delegated to searc for land that would be appropriate as a Walapai home and recommended purchase of lands on the Sandy (W P. 160-61). Meanwhile, the Indians had become fixture around the railroad towns from Seligman to Kingman where most of them remain to this day. (Appendix, 120. In 1931, their physician recommended that they be moved "from their present unsightly and unhygienic homes t acceptable sites on the reservation" (W. P. 288).

The General Allotment Act of February 8, 1887 (2 Stat. 388; Appendix 46), provided for the allotment o lands in severalty to Indians on the various reservation and for the means by which Indians could obtain allot ments on public lands outside of reservations. Congres recognized in 1887, as the Commissioner of Indian Affair reported in 1890 (R. 37), that the "Indian title" wa found only in reservations.

The Walapai continued to live with and work for white people, keeping their promise not to interfere with thei rights. In the hearings at Valentine in 1931, the Indians did not question Respondent's complete legal rights to the grant lands both inside and outside the "reservation." As we read the record, they were concerned with lands inside the "reservation" only, and there asked, not for confiscation, but that the Government procure lawfully the rights they desired. Thus one "petition" recited in part:

"It must be apparent that the purpose of the act

of Congress of February 20, 1925, was to permit the Santa Fe Pacific Railroad Co. to consolidate its right to the ownership of lands embraced within the boundaries of the Walapai Indian Reservation into one compact area or block. As the representatives of Arizona in Congress to whom this petition is addressed know, the act under which the Santa Fe Pacific Railroad Co. now holds title to the land grants offered by Congress to the Atlantic & Pacific Railroad was passed in 1868 [1866]. It provided, in substance, for the granting to the railroad company of each alternate section of land lying along the railroad right-of-way for a distance of 40 miles on each side of the center of its track. Thus, it is that the greater portion of the Walapai Indian Reservation is embraced within the limits of the grant. • • •

"The undersigned do not regard their treatment by the United States Government in this instance as just. We believe there yet remains much open unappropriated public domain outside the limits of our reservation which could be granted to the railroad, and other claimants, in lieu of the lands they are to surrender within the reservation" (W. P., 260).

At Valentine, the Indians desired only that the Government obtain railroad lands for them, in a manner suggested by previous legislation and administration. When settlers had located on railroad lands, Congress purchased such railroad lands for them from the railroad, giving other lands in exchange therefor (Act of June 22, 1874, 18 Stat. 194; Appendix, 42). When some of Respondent's lands at Truxton were needed in 1900 for Walapai school purposes, the Interior Department found it possible to procure a conveyance (W. P., 189-91). On March 4, 1913, Congress felt it necessary to acquire from the railroad for Indian use certain railroad lands, and did so by exchanging public lands for the desired acreage (Appendix, 66). On August 24, 1922, Congress similarly acquired Respondent's rights to lands in Mohave County for white settler benefit (Appendix, 68). Similar acquisitions for Indian use of railroad

and other titles within Indian reservations were arrange by the Act of April 21, 1904 (33 Stat. 189, 211; Appendi 62), but not permitted in the Walapai reservation unde the Acts of May 25, 1918 (40 Stat. 561; Appendix, 67), an February 20, 1925 (43 Stat. 954; Appendix, 68). Thes acts are a perfect confirmation of Respondent's title a against all possible Walapai claim, and are a forcefu reminder that purchase and not confiscation is the America way of obtaining private properties for Indian use. Th Indians have not, we submit, demanded, and can not b given, privately owned land by any other method.

D. *The Granting Act and Related Statutes and Thei Administration Have Confirmed Respondent's Beneficia Title and Denied the Rights Claimed for the Walapa*

We have already advanced a construction of the Grant ing Act (*supra*, pp. 13-18) which forms the necessary back ground for this detailed study of the other laws relatin to the grant, and the details of Executive action, whic together leave no doubt of the intent of Congress to ves perfect beneficial title in Respondent and to deny al Walapai claim. On July 27, 1866, every acre of land i Arizona not reserved had been specifically made publi land, open to sale and grant. The grant was not a gratuity but a sale by contract, *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680 (1914); *United States* v. *Northern Pacifi R. Co.*, 256 U. S. 51, 64 (1921). The Government has re ceived every benefit it contracted to receive in exchang for the lands, namely, construction of the railroad, crea tion of value for the even-numbered sections retained i the grant limits, the settlement, development, and unifica tion of the country, mobility for troops, munitions, an Government supplies, and, lastly, reduced rates for Gov ernment transportation. Items such as the last, a continu ing burden to the railroad and benefit to Petitioner

amounted to such disproportionate exaction from the railroads generally that the President recently recommended to Congress legislation to terminate it. Congress gave a measure of partial relief, but required reconveyance of part of the lands granted as a condition upon obtaining it. (Sec. 321(b), Transportation Act, 1940; Appendix, 77.) Respondent has been called upon to reconvey, and has reconveyed, all first cause lands, among others (Appendix, 78). The United States has received and will continue to receive a good price for every acre the Indians now claim.

After the Atlantic & Pacific filed its map of definite location, the Commissioner of the General Land Office, on May 17, 1872, ordered all the odd-numbered sections involved in the litigation withdrawn from settlement entry. The Commissioner of the General Land Office was making official and public record that the odd-numbered sections had passed out of the public lands, and into the railroad's private ownership, that the even-numbered sections were still public land and within his jurisdiction, but to be disposed of only as reserved even-numbered sections were ordered to be disposed of by the Act of March 3, 1853 (10 Stat. 244; Appendix, 18), and Section 6 of the Granting Act (Appendix, 34), and that until March 12, 1872, every acre involved in this litigation had been public lands, potentially subject to the grant, but open to settler entry, by virtue of Section 3 of the Granting Act and other governing laws.

As the background of administration, and of other legislation, it will be recalled that the year before the map of location was filed, Congress (Act of April 20, 1871, 17 Stat. 19; Appendix, 42) authorized the Atlantic & Pacific Railroad Company to mortgage its property. The lands were mortgaged, and the railroad from Isleta, New Mexico, to the Colorado River, was constructed, accepted, and operated (R. 57-60). In the 1890s came fiscal difficulties and default upon the mortgages; and by

Act of March 3, 1897 (29 Stat. 622; Appendix, 56), Congress provided for the purchase of the lands and other properties of the railroad at foreclosure, and their transfer to Respondent. The Act of June 27, 1902 (32 Stat. 405; Appendix, 60), provided for the sale or lease of Respondent's property to The Atchison, Topeka and Santa Fe Railway Company, also that

> "* * * said land-grant lands to *remain as now* chargeable with taxes as assessed and collected under and by virtue of the laws of the said Territories of New Mexico and Arizona. * * *" (Emphasis ours.)

There are marshalled with these last named acts, which assured mortgagees and purchasers that the railroad's title had value, acts which imposed upon the railroad the burdens of beneficial ownership. The only lands owned after 1886 and acquired by Respondent were in Arizona and western New Mexico. These acts required the railroad to pay the cost of surveying its lands and to pay taxes thereon, to the end of supporting white settler institutions and identifying for settler benefit lands which were not granted. There was no question of Indian title, only the purpose to promote white development.

The Act of July 31, 1876 (19 Stat. 102, 121; Appendix, 43), required the railroad to pay the cost of surveying its lands. The Act of July 10, 1886 (24 Stat. 143; Appendix, 44), provided that grant lands should be taxable by the territories and states after survey and before patent and that railroads would be required to pay the surveying costs after the completion of survey. It is not conceivable that Congress directed the payment of surveying costs and taxes on the naked fee, when the right to possession, indeed the entire beneficial ownership, was in the Indians.

On March 3, 1887 (24 Stat. 556; Appendix, 47), Congress implemented the Act of 1886 by requiring the Secretary of the Interior to "adjust" the land grants, *i. e.*,

determine what passed under them. Such lands would thereupon, before patent as provided in the Act of 1886, be subject to taxation; and all other lands could be disposed of to settlers.

The Act of June 25, 1910 (36 Stat. 834; Appendix, 64; legislative history, R. 126-30), was passed to expedite adjustment of land grants, and the early subjection of "the lands granted to taxation * * *." It added to the Secretary's power to adjust the grant, the power and duty to force railroads to pay, before surveying, the estimated cost. *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492. Under these laws Respondent was not merely privileged but forced to take complete evidence of title to all lands in controversy, pay for their survey, and pay taxes thereon.

Second cause of action lands are alleged to be patented as they were required to be by the laws. The history of first cause lands is, as held by the Circuit Court of Appeals, "cumulative evidence of a purpose of the government to deny a right of occupancy to Indians within the Mexican cession not recognized by Spain and Mexico," evidence applying "as well to lands outside the reservation—" (114 F. (2d) at 426, R. 426).

The legal title to the odd-numbered sections, identified March 12, 1872, had been in the Atlantic & Pacific Railroad Company since July 27, 1866, by act of Congress, *United States* v. *Southern Pacific R. R. Co.*, 146 U. S. 570. These sections were of course beyond all power of the President to reserve for the Indians. Further, even numbered sections were by Congress expressly opened to settlement (Act of March 3, 1853, 10 Stat. 244; Appendix, 18; Secs. 3 and 6 of the Granting Act, Appendix, 31, 34). Considering that the Congress had designated Lower Colorado River Reservation as the Walapai's legal home, that the odd-numbered sections belonged to the railroad, and that the even-numbered sections were dedicated to settlement by

law, President Arthur's order of January 4, 1883 (W. P., 146), was probably, at the outset, a void effort to achieve a prohibited end. His order did not, of course, affect in any way Respondent's vested title. Only the implied ratification of the reservation for Indian purposes of the even-numbered sections, afforded by the Acts of Congress which we will now discuss, appears to lend validity to the reservation for Walapai use of the even sections; and these acts and their administration have confirmed Respondent's complete title to the odd-numbered sections as against every possible Indian claim.

In 1904, Congress, because of the many instances in which the Executive had extended Indian reservations over privately owned property, provided that in such instances the owner of private lands should have the option to exchange them for lands in the public domain outside such reservation (Appendix, 62). Reservations in Arizona and New Mexico, with the exception of the Walapai, were handled under the terms of that Act (R. 64; see *Atlantic and Pacific R. R. Co.* v. *Willard*, 17 L. D. 554; Regulations under the Act of April 21, 1904, 34 L. D. 666; *Santa Fe Pacific R. R. Co.*, 35 L. D. 83 (Zuni and Navajo reserves), and 41 L. D. 96 (Moqui reserve)). It was not applied to the Walapai reserve, because the Act of May 25, 1918, above referred to (Appendix, 67), prohibited the extension of Indian reservations.

In 1919-1920, the Secretary of the Interior authoritatively determined that "The railroad company has *full, complete and incontestable title* to the odd-numbered sections in this [Walapai] reservation * * *" (W. P., 320-21, emphasis supplied). The Commissioner of Indian Affairs opposed this determination, presented every theory presented in this case, and was overruled.

In 1923, the Secretary of the Interior advised the Congress that Respondent's title had been determined to be

good, stated the Act of 1918 probably prevented exchanges under the Act of 1904, increasing the acreage reserved for Indian purposes, and suggested the enactment of a law, draft of which the Secretary attached to his letter (H. Rep. No. 1446, 68th Cong., 2d Sess. See W. P., 206-7) The Secretary's proposal became the Act of February 20, 1925 (43 Stat. 954; Appendix, 68), as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, in his discretion, under rules and regulations to be prescribed by him, to accept reconveyances to the Government of privately owned and State school lands and relinquishments of any valid filings, under the homestead laws, or of other valid claims within the Walapai Indian Reservation in Mohave and Coconino Counties, Arizona, and to permit lieu selections within the boundaries of the said reservation by those surrendering their rights so that the lands retained for Indian purposes may be consolidated and held in a solid area so far as may be possible; *Provided*, That the title or claim of any person or company who refuses to reconvey to the Government shall not be hereby affected."

Negotiations progressed under the Act to the point of joint appraisal of the lands within the exterior bounds of the reservation, and agreement for the division of the lands between the Respondent and the Indians. In the arrangement a controversy over Peach Springs and surrounding lands on even-numbered sections was settled, and the Interior Department obtained other arrangements desired for the Indians (W. P., 225-39, 303-4, 327-46).

In the hearings before the subcommittee of the Senate Committee on Indian Affairs, held at Valentine, Arizona, on May 22, 1931 (W. P., 239-54), the Indians made it clear they wanted all the lands within the exterior bounds of the reservation (W. P., 247-83, 395-7, 346-54); but nothing outside such boundaries was touched upon by anyone.

Subsequent opinions of the Solicitor of the Interior Department and the Assistant Attorney General were to the effect that the Indians had no right within such exterior boundaries against Respondent's title (W. P., 319-27).

The Peach Springs judgment was entered in July, 1931, upon stipulation (R. 65-66) reading in part:

> "• • • and said The Atchison, Topeka and Santa Fe Railway Company and/or Santa Fe Pacific Railroad Company, a corporation organized and existing under the laws of the United States, all of the capital stock of which, except directors' qualifying shares, is owned by said The Atchison, Topeka and Santa Fe Railway Company, having reached a satisfactory understanding and agreement with the United States of America for the Use and benefit of the Walapai or Hualapai Indians pursuant to authority contained in the Act of Congress of February 20, 1925 (43 Stat. 954), entitled 'An Act to provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona,' for the exchange and consolidation of large areas of lands of the respective parties, including the lands and waters concerned in this action, lying within the Walapai or Hualapai Indian Reservation in the State of Arizona, the plaintiff and the defendant in the action above numbered and entitled do hereby stipulate, subject to the approval of the Court, that judgment shall be rendered for the Plaintiff in this cause fixing the respective rights and titles of the parties as follows."

On June 13, 1932, the Senate tabled a joint resolution proposed by Senator Frazier which, if passed, would have directed delay in consummating the exchange agreement. On June 17, 1932, Senator Frazier himself wrote the Secretary of the Interior requesting delay and further study (W. P., 356). This action was instituted June 28, 1937 (R. 24), and resolved in so far as present title to first cause lands are concerned by Respondent relinquishing them under the Transportation Act of 1940 (Appendix, 78).

E. *Summary Comment.*

The complex of history we have reviewed should be judged as a whole. Many of the acts of Congress and the Executive are so plain that they are not to be mistaken and are alone effective to prove our points; nevertheless, all are manifestations of a single policy which denies all Walapai right to the lands here involved and confirm Respondent's right and title. The formation and application of this policy was and is exclusively a political matter. "Save to the extent that Congress may authorize, the government's dealings with Indian tribes are not subject to judicial review." *Klamath Indians* v. *United States*, 296 U. S. 244, 255 (1935). "To give the relief now sought it would be necessary to render a judgment predicated upon the abrogation of express provisions of the treaties and statutes concerned and the substitution for them of other provisions which Congress has never enacted or authorized. These are political, not judicial powers." *Sioux Indians* v. *The United States*, 277 U. S. 424, 436 (1928). "The propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy." *Beecher* v. *Wetherby*, 95 U. S. 517, 525 (1877).

The history reviewed requires the adoption of the process and, if the Walapai ever had rights, the application of the holding of *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), in which Mr. Justice Brandeis for the Supreme Court reviewed the long history of dealings which were claimed to show that the United States disregarded Shoshonean rights by introducing Arapahoes onto lands guaranteed to the Shoshoneans by treaty, and said (495-6):

> "* * * Looking at events in retrospect through the long vista of the years * * * the outstanding fact remained that for good or for ill, the Arapahoes were to dwell upon the soil along with them. 'The adoption by the United States of the wrongful act of any officer

> is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.' *Croizer* v. *Krupp*, 224 U. S. 290, 305."

Accordingly, if at some time in the past Walapai rights could have been asserted, they can not be advanced now. *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935). Conveyances honestly and deliberately made can not be rescinded. *Sinking Fund Cases*, 99 U. S. 700, 718-19, (1878); *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 680, (1914); *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51, 64, (1921); *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228, 238 (1921).

Congress itself has made no effort to change its policy of non-recognition of the Indian claims and confirmation of Respondent's rights. The Indians' counsel ask this Court to legislate a different policy.

VII.

The Secretary of the Interior, Duly Empowered by Congress, Has Conclusively Adjudicated Respondent's Right to the Lands in Issue.

Laying aside all other considerations, nevertheless the motion to dismiss was properly granted because the complete title to all of the lands in question has been adjudicated by the Secretary of the Interior, pursuant to Congressional direction, to be in Respondent. The trial court so held (R. 195), and the point was urged in the Circuit Court of Appeals, but not there considered in the opinion.

As to second cause lands, all now in issue are patented [15]

15. While it has been assumed by both sides throughout that all second cause lands were patented (Brief, p. 4), recent investigation by Respondent indicates that patents have not issued as to some second cause lands. The point is mentioned for precision only. It is immaterial as such lands have been now quitclaimed to the United States (Appendix, 78). Re-

Such patents were issued to Santa Fe Pacific Railroad Company (R. 18), subsequent to March 3, 1897, the date of the Act (29 Stat. 622) under which Respondent was incorporated. See Act of June 27, 1902 (32 Stat. 405; Appendix, 60). The patents are full evidence of Respondent's beneficial ownership to all second cause lands now in issue. *Burke* v. *Southern Pacific Ry. Co.*, 234 U. S. 669. An Indian right of occupancy is as valuable as the fee, and where present superimposed upon the fee deprive the later title "of every beneficial incident." *United States* v. *Shoshone Tribe of Indians*, 304 U. S. 111, at 116. The patents were issued pursuant to determination of Respondent's right thereto by the Secretary of the Interior, required by the Act of March 3, 1887 (24 Stat. 556; Appendix, 47). Such determination by the Secretary of the Interior was conclusive and not subject to review or revision by a judicial tribunal. *Butte A. & P. Ry.* v. *United States*, 290 U. S. 127. That case involved Section 204 of the Transportation Act of 1920,[16] which provided for payments to any carrier of a specified class "which sustained a deficit in its railway operating income" during a control period as compared with a test period. The Butte Company made claim; the Commission held that the term "deficit" meant earnings less in the control period than in the test period, and certified an amount to the Secretary of the Treasury, which was paid. Some years later the Commission reversed its

spondent asserts no claim to lands in issue except under the Granting Act, and petitioner seeks no relief as to second cause lands not patented, if any there be, except a decree quieting title as against that claim. As to unpatented second cause lands the case is now in the same category as first cause lands.

16. The Transportation Act provided:

"* * * the Commission shall ascertain for every carrier * * * its deficit in railway operating income, if any. * * *" (Sec. 204 (e), Transportation Act, 1920, 49 U. S. C. A., Sec. 73.)

The Adjustment Act provided:

"* * * the Secretary of the Interior * * * is hereby authorized and directed to immediately adjust, * * * each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted." (Act of March 3, 1887, 24 Stat. 556, Appendix 47.)

construction, and held that "deficit" meant "red ink" deficit only, and issued an order cancelling the prior certification to the Treasury of the Butte claim. The United States sued the Butte Company to recover the payment. The United States prevailed in the lower court, the Circuit Court of Appeals affirmed, 61 F. (2d) 587, at 591, holding the latter construction of "deficit" to be correct. Upon appeal, this Court held that there was no occasion to determine which construction was correct:

> "The government cannot recover, because *when Congress, by Sec. 204, imposed the duty to certify the amounts severally due to carriers, it required the commission—and hence authorized it—to determine whether the claimant was entitled to relief.*" (p. 136, italics supplied.) • • •
>
> "In deciding any one of the enumerated questions of construction as in other rulings of law or findings of fact the commission may err." • • •
>
> "Since authority to pass upon the meaning of the word 'deficit' and upon each of the other questions of construction, is essential to the performance of the duty imposed upon the commission, and Congress did not provide a method of review, we hold that it intended to leave the government as well as the carriers, remediless whether the error be one of fact or law." (pp. 142-3.)

West v. *Hitchcock*, 205 U. S. 80, 84, is in accord as to determinations required to be made by the Secretary of the Interior. The Adjustment Act of 1887, and the Transportation Act, parts of which are above set out in parallel columns (Note 16), each manifest an identical attempt to confer a power and duty of decision. The Adjustment Act of 1887 contains internal evidence of Congressional intent to make the future determinations of the Secretary final. The first section (unnumbered) directs the Secretary to adjust the land grants if heretofore unadjusted. Section 2 provides for cancellation where lands have been *heretofore* "erroneously certified or patented." Nothing

decided in *United States* v. *Southern Pacific Railway Company*, 184 U. S. 49, 55, is to the contrary as Sections 4 and 5 only were there involved. Nor is anything in *Logan* v. *Davis*, 233 U. S. 613, in opposition. Section 4 was there involved. The statement in the latter opinion that *United States* v. *Southern Pacific Railway Company, supra*, referred to the language of Section 2 (p. 627), is clearly in error.

While patents conclusively evidence the Secretary's determination, they are not the only way in which it may be made evident. His decision is not a matter of any particular form, and once made known, a court will not make an inquisition into his mental processes to see whether his reasons were correct. *West* v. *Hitchcock*, 205 U. S. 80.

As to the first cause lands, public records (W. P. 326) show that his determination was made in 1919.[17]

The Secretary, having determined the full beneficial title to be in the Respondent, the determination may not be reviewed in any judicial proceeding. *Butte, Anaconda & P. Ry.* v. *United States, supra; West* v. *Hitchcock, supra.* Constitutional objections with regard to deprivation of property rights are not available for the protection of the claimed right of these Indians. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

17. In 1919, the Commissioner of the General Land Office desired a survey of this tract and inquired of the Secretary of the Interior as to funds for that purpose. The Secretary consulted the Commissioner of Indian Affairs, who made claim to all of the tract for the Indians. On October 2, 1919, the Secretary advised the Commissioner of the General Land Office:

"'This matter has been given careful consideration * * * and conclusion reached that there is no such Indian claim as prevents the railroad grant from attaching to these lands; * * *.'

"On October 20, 1919, the Secretary made demand upon the railroad company to deposit its share of the cost of the survey under penalty of forfeiture of its grant.

"On December 27, 1919, the Indian Commissioner protested the ruling, and on January 26, 1920, the Secretary replied that *the matter had been reviewed and the unanimous conclusion of the officers of the department was*—

"'*That the railroad has full, complete, and incontestable title to the odd-numbered sections in this reservation and embraced in the grant limits.*'" (W. P., 326, emphasis supplied.)

VIII.

The Walapai Can Claim No Right Stemming From the Laws of Spain and Mexico.

Petitioner contends that the laws of Spain and Mexico are "irrelevant" (Brief, 61), and rests its case on statutes of the United States and decisions of this Court (Brief, 59). It follows that the Walapai were given or denied rights dependent upon the sovereign will of the United States; and this same position of Petitioner, that the title of the United States was "originally absolute" (R. 207), relieved the Circuit Court of Appeals of meticulous inquiry into the laws of Spain and Mexico and released it to an inquiry as to what Congress had done with respect to the particular lands and particular Indians in question. This inquiry the Court made (R. 210); and it did not, as Petitioner claims, "advance an argument" that Indians' rights were to be measured by Spanish or Mexican law, or advance any other "argument" respecting such law (Brief, 59).

The Spanish and Mexican law is, under the case presented, important as a demonstration that the United States' title was absolute, in a political as well as strictly legal sense, and also because it is demonstrable that Congress inquired to ascertain what rights Indians such as the Walapai enjoyed under such laws, and determining that they enjoyed no right, a determination binding on this Court, felt free to deny and did deny to the Walapai all rights to land except to lands assigned to them.

The rights of Mexico as a nation, and the rights of Indians and other inhabitants of Mexico, whatever they may have been, under Spanish and Mexican laws, were not protected by the due process clause of our Constitution, or by the courts of the United States, from such conquest or other disregard as they might be subjected to by the political branch of the United States Government. Only rights

vested under the laws of the United States become protected by the Constitution. Rights outside those laws are protected by the practices of nations; but the courts of this nation can not question what is done by the political arm.

The Treaty of Guadalupe Hidalgo (Appendix, 3) was an agreement between nations following a conquest. The covenants of the United States with Mexico with respect to protection of vested rights of Mexicans, and taking measures in removing Indians like the Walapai, and settling the lands they occupied, were political covenants, unenforceable in courts until Congress should give courts jurisdiction or until Congress should so proceed under them as to vest rights under our domestic laws.

As Mr. Justice Holmes said in *Carino* v. *Insular Government*, 212 U. S. 449, 458, what is important is, not so much actual rights enjoyed under a prior sovereignty, but what the United States has asserted to be such rights, or lack of them, and what the United States has decided to protect or not to protect.

Courts are not authorized to inquire as to whether Congress' dealings with lands of the Mexican cession may have been in violation of the treaty of cession; for a violation would be "a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This Court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616; *Taylor* v. *Morton*, 2 Black 481, affirming 2 Curtis, 454 Fed. Cases No. 13799; *Head Money Cases*, 112 U. S. 580, 598; *Whitney* v. *Robertson*, 124 U. S. 190, 195." *Botiller* v. *Dominguez*, 130 U. S. 238, 247.

Congress required all claims to California lands, based

on the laws of Spain and Mexico, to be presented to a specially constituted court; and those not presented within a two-year period were wiped out. *Botiller* v. *Dominguez, supra; Barker* v. *Harvey*, 181 U. S. 481. Congress reserved to itself all consideration of claims in Arizona and New Mexico until 1891; and during that period no court had jurisdiction to consider them, since such claims were political claims without the jurisdiction of courts until Congress should define the rules by which they might be established and the jurisdiction of a court to consider them; and decisions by Congress were final, *Tameling* v. *United States Freehold etc. Co.*, 93 U. S. 644, 662-3; *Astiazaran* v. *Santa Rita Mining Co.*, 148 U. S. 80, 81-4; *Maxwell Land-Grant Case*, 121 U. S. 325, 366, and 122 U. S. 365, 371. In 1891 Congress established a tribunal, requiring that all claims and titles *not perfect* should be presented to it within two years, or be forever destroyed (Appendix, 51). An Indian claim, as the present one, based on factual allegations and without support in any formal title documents of any kind, is an imperfect claim; and the Walapai never presented such claim as they may have had under Spanish and Mexican law to that tribunal or to Congress, which alone had jurisdiction to determine it. The jurisdiction of the tribunal established in 1891, together with the Court itself, has long since disappeared. The Walapai claim, if ever it could have been asserted as a justiciable claim under Mexican or Spanish law, is now only a political claim, as it was prior to 1891—a claim to lands long since legally vested in Respondent by acts which may not constitutionally be recalled.

During all the years of its existence as a political claim (and here we assume without foundation for assumption the existence of a claim), the Congress manifested a determination not to recognize any Walapai claim, or create a legal and justiciable Walapai right to any of the lands here claimed. This history has been minutely reviewed

and will not be repeated here. Our point now is that the Mexican and Spanish law are immaterial except as explanation for the political motivation of Congress. A study of these laws was made for the courts below, and another is presented for the benefit of this Court in a separately bound part II of this brief, of which Dr. Max Radin is the author.

IX.

Petitioner's Theory That Under the Law the Walapai Had an Exclusive Right to All Lands Claimed and Possessed by Them, Valid Against All Except the United States, Is Unsound Because—

A. *The Indian Theory Is Based Upon a Mistaken Generalization of History.*

In approaching this case, it is necessary to answer, not the question of what the sovereign should have done, not what the sovereign did with respect to any Indians other than the Walapai, not what the sovereign has done in making the Walapai wards and providing gratuity appropriations, but the precise question of what rights to lands Congress has accorded the Walapai. This determinative question counsel for the Indians do not answer. Treaty and statutory rights of other Indians are pointed to. The ethical and moral concepts behind legislation and treaties provided for other Indians in other territories are used in an effort to create Walapai rights to the land in issue. This right asserted for the Walapai is "based on immemorial possession" (Brief, 14), is held "by reason of aboriginal occupancy" (Brief, 17). "Actual possession from time immemorial gives rise to" this right; and the rule is general (Brief, 29). In short, possession, a fact, creates a legal right; and this must be true whether or not the sovereign, the source of all legal rights, creates such a right or not, for the reason that the Walapai are said to enjoy this right

though the sovereign has not given them a right to the particular lands claimed for them. This reasoning stands in marked repugnance to the actual course of history and the actual dealings by the sovereign source of titles. As said by Mr. Justice Holmes in a realistic appraisal, "whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land." *Carino* v. *Insular Government*, 212 U. S. 449, 458 (1909). This purpose was effectuated in many ways. Varying protection was given to the Indians in varying localities, dependent upon their relative power and a variety of other considerations and circumstances. What rights any group of Indians had or have depends, not upon a universal absolute but upon what had been given them by the source of all legal rights.[18] We have demonstrated that the Walapai were not given any rights to the lands now claimed for them.

As used by Petitioner, the phrases "immemorial possession" and "aboriginal right of occupancy"[19] are "perni-

18. The point was well made, by Mr. Chief Justice Taney, speaking of a treaty reservation. He said:

> "It is true that it is occupied by the Tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians held to be, and treated as, subject to their dominion and control." *United States* v. *Rogers*, 4 How. 570, 572 (1845).

19. The thought that "immemorial possession" gives aborigines legal rights against a sovereign and its subjects without action by the sovereign creating legal rights, is ill-founded but persistent. It sprang from theoretical writings and a relatively late but widespread practice of the English sovereign and his successors in political power, to create Indian possessory rights by legislative action. It found expression as a result of the tendency of early courts to describe legislative action in terms of universal moral principle.

As a matter of fact, up to 1763, "'English civilization scorned and neglected the Indian,' at least so far as it relates to his possessory right." *Eighteenth Report of the Bureau of American Ethnology*, Part II, p. 550. Until late years aborigines generally were widely treated as something less than human: the slave trade was not ended until 1830. (A. H. Snow,

ious abstractions," taken from misunderstood dicta, and used to weave a "web of unreality" obscuring clear outlines of pertinent history and law. *Graves* v. *New York*, 306 U. S. 466, 490. There have been cases dealing with other Indians, other places, and other times, and with statutes and treaties not pertinent here, in which the result was properly and unavoidably that the Congress had by law, directly or through agents exercising delegated power, given legal rights to Indians to possess all lands occupied, or part of lands occupied, or even lands never occupied by them prior to the grant of rights. If, in some decisions, "partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes," (*Ibid.*, 489) judges described the acts of legislatures in terms of high and universal moral principle, such expressions were nothing but descriptions of what the political power had elected to prescribe as law, for the particular lands and Indians before the Court, and were not then or since limitations upon the sovereign's perfect power to

The Question of Aborigines in the Law and Practice of Nations, a report to the Department of State, Government Printing Office, 1919.)

More lenient French treatment made Indians French allies in the French and Indian war; and at the end of that war, for obvious reasons, the English sovereign inaugurated a new policy (*Bureau of American Ethnology, Eighteenth Report, supra*, p. 558), defining, by the proclamation of 1763, areas in which Indians were to have possessory rights and in which white intrusion was forbidden. Treaties were also negotiated. *Mitchel* v. *United States*, 9 Pet. 711; and by the time the Colonists rebelled, they had cause to complain in the Declaration of Independence that the King had used his new Indian allies against his white subjects.

After independence, the Congress of Confederation followed the pattern of the Proclamation of 1763, giving Indians certain possessory rights by Act of September 22, 1783 (*Bureau of American Ethnology, Eighteenth Report, supra*, p. 553). There later followed the Northwest Ordinance, and various other statutes and treaties relating to various territories and various Indians (Appendix, 75-79).

As the creation of Indian rights in the first instance was prompted by political weakness, increasing strength caused rapid destruction of rights already created, and a cessation of creating new ones. As early as 1823, Indians east of the Mississippi had been removed by force and the lands parceled out to settlers. *Johnson* v. *McIntosh*, 8 Wheat. 543, 589. Many Indians of the West were never given rights at all, except in reservations created by statute or treaty. Of such are the Walapai. In every case the rule of decision by courts has been, and necessarily must always be, what "our own government has adopted in the particular case, and given us as the rule of our decision." *Johnson* v. *McIntosh*, *supra*, at p. 572.

enact different laws applicable to other peoples and territories.

Certainly the Walapai have no rights to the lands here in issue; because there can be no doubt, as we have heretofore demonstrated, that Congress not only gave them none but affirmatively willed that they should not have any.

B. *None of the Cases Cited by Petitioner, Correctly Analyzed to Determine Exactly What They Hold, Supports the Theory.*

Petitioner has been unable to cite a single case in which a tribal claim to any particular lands has been sustained when that claim was not based upon the provision of a treaty, a statute, or an executive order. We assert with confidence that no such case emanating from this Court can be produced. We will analyze the cases cited.

Johnson v. *McIntosh*, 8 Wheat. 543 (1823, Brief, 15, 17), was decided against the background of rights theretofore created by legislative acts. The actual holding of this case is shown in its short syllabus:

> "A title to lands, under grant to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, cannot be recognized in the courts of the United States."

The rule of decision is that which "our own government has adopted in the particular case, and given us as the rule for our decision." (p. 572.) The Court points out that "all the nations of Europe * * * have asserted * * * the exclusive right of the discoverer to appropriate the lands occupied by the Indians." (p. 584.) The United States owned the fee of the lands in question; had given to the Indians in question the legal right to occupy; but, nevertheless, with respect to other Indians had already exercised its conqueror's power as far as the Mississippi (1) by the

sword and (2) by permitting the Indians to be crowded out, subsequently parcelling out the lands. "It is not for the courts * * * to question the validity of this title, or to sustain one which is incompatible with it." (p. 589.) The case goes in discussion far beyond what was required by the issue; the opinion tends to generalize legislative acts into a universal "principle"; but the discussion above quoted supports Respondent, and does not even suggest that the courts should give the Walapai rights withheld and denied by the Congress.

Worcester v. *Georgia*, 6 Pet. 515 (1832, Brief, 19), held that, Great Britain and the United States having by treaties recognized the Cherokee as a self-governing nation, and created in them legal rights to land, the Cherokee territory was held to be not subject to Georgia laws. Specifically, it was held that Georgia had no power to forbid and penalize entry into Cherokee country without license from Georgia. The case involves only application of the Constitution, laws, and treaties of the United States which had, with respect to the Cherokee, created both legal and political rights. The opinion makes it clear that the sovereign need not have created these rights, and that the Court's language and holding are simply applications of the rights created by the sovereign:

> "But power, war, conquest, give rights * * * which can never be controverted by those on whom they descend." (p. 543.)
>
> "A more conciliatory mode was preferred. * * *." (pp. 579-80.)
>
> "We have made treaties with them; * * *. By entering into them, have we not admitted the power of this people to bind themselves, and to impose obligations on us?" (p. 582.)

This case can have no effect to create rights in the Walapai, whom the soverign has never recognized as a nation, and to whom the sovereign has never conceded

rights to land. Neither does it establish that Arizona does not have full political power over northwestern Arizona, and the balance of the State, over all of which Walapai and similar Indians once roamed.

The case of *Mitchell* v. *United States*, 9 Pet. 711 (1835, Brief, 20) settled a controversy between the United States and the private owners (not Indians) of a grant made by Indians and by Spain. The Indians in question enjoyed rights to the lands which they and the Spanish sovereign conveyed, by treaties. The case demonstrates that Indians enjoyed only such rights as were created in them by the sovereign. The English laws and treaties during the period 1763 to 1783, when the territory was governed by Great Britain, accorded possessory rights to the Indians in question, and forbade white men to trespass or trade without license (pp. 745-6):

> "By thus holding treaties with these Indians, accepting of cessions from them, with reservations, and establishing boundaries with them, the King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties." (p. 749.)

The King of Spain, taking possession in 1783, because of his own weak tactical position, found it necessary to enter into treaty relations with the Indians and give them property rights "which had not before been done in any of his dominions." (p. 753.)

> "* * * When they [the United States] acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relation of the Indians towards the United States. * * * They could assume

> no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; * * *." (p. 754.)

The *Mitchel* case is an extremely useful laboratory for determining the process to be applied in a correct decision of this case. The territory ceded in 1848 was of those "dominions" in which the Spanish King had created no Indian rights and had found it possible to ignore loose Indian "pretensions that the Spanish government notoriously disregarded, further than a cautious policy required." *Marsh* v. *Brooks*, 14 How. 513, 523 (1852). The Indians had no rights, then, when they came into the United States, and our own laws have not granted them rights to the lands here in issue.

Chouteau v. *Molony*, 16 How. 203 (1853 Brief, 21). Dubuque purchased from the Fox Indians a right to certain mines, and subsequently obtained what his assignee claimed was a grant from the Spanish Governor. The issue was whether or not this concession from the Governor was a complete title to the land. It was held that it was not. The mining laws of Spain were considered, together with the formalities usually accompanying grants of land. The terms of the "purchase" from the Indians were considered as important in determining the intent of the Governor. There was an extensive review of the practices of the Spanish Governors in Louisiana, and the various instructions given under authority of the King from time to time. The precise foundation of the Indian rights is not disclosed; but the Court does state that "Spain at all times, or from a very early date, acknowledged the *Indians' right of occupancy* to these lands * * *." (Emphasis ours.) Here again we see specifically conferred rights in specific territory, a territory where the King's policy of liberality, bred of the caution inspired by a dangerous situation, was in notorious contrast to his policy where a "cautious policy"

did not require. Most of the Fox Indians' rights or claims were taken away by a treaty by which the United States concluded a successful war against them. 7 Stat. 374.

Holden v. *Joy*, 17 Wall. 211 (1872, Brief, 21), did not involve any "rule with respect to aboriginal possession." The contest was between Joy, a purchaser from the Government, and Holden, a homestead claimant. The land was included in that which the United States had by treaty agreed, in consideration of the Cherokee among other considerations moving from lands previously owned by treaty and also paying $500,000, "to convey to the said Indians and their descendants, by patent in fee simple, a certain tract of land * * * estimated to contain eight thousand acres * * *." (p. 238.) This treaty was dated December 29, 1835. The lands were surveyed, and patent issued December 1, 1838 (p. 246). By treaty of July 15, 1866, the Cherokee reconveyed the lands to the United States, to be sold for Cherokee benefit (p. 248). The land was sold to Joy; but Holden had, subsequent to July 15, 1866, become a homstead settler. Joy prevailed. There are details of the history which we omit; those sketched suffice to show the issue involved.

The Court recited the many treaties that had been made with the Cherokee; and why it wrote the metaphysical dictum quoted by Petitioner is not explainable. The Court cited for the passage reproduced by Petitioner (Brief, 21-22) only *Mitchel* v. *United States*. Perhaps the more appropriate statement of Petitioner's position appears at page 243 of the report:

> "Beyond doubt the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, * * *."

Concerning *Buttz* v. *Northern Pacific Ry. Co.*, 119 U. S. 55 (1886, Brief, 22), the Petitioner is in error in stating

that it applied any rule "to the protection of Indian aboriginal occupancy." The exact issue in the case was between the railroad and a settler, and the question of Indians' rights was only collaterally involved.

The settled beginning point in this case is what is at issue in this; for admittedly, the lands in dispute in the *Buttz* case were "in what was known as Indian Country." (p. 66.)

The treaty with the Sioux, made in 1867, prior to the filing of the Northern Pacific map of definite location, recited the background history as follows (15 Stat. 505):

> "Whereas Congress, in confiscating the Sioux annuities and reservations, made no provision for the support of these, the friendly portion of the Sissiton and Warpeton bands, and it is believed (that) they have been suffered to remain homeless wanderers, frequently subject to intense suffering from want of subsistence and clothing to protect them from the rigors of a high northern latitude, although at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites; and
>
> "Whereas the several subdivisions of the friendly Sissiton and Warpeton bands ask, through their representatives, that their adherence to their former obligations of friendship to the government and people of the United States be recognized, and that provision be made to enable them to return to an agricultural life and be relieved from a dependence upon the chase for a precarious subsistence: * * *"

The Treaty in Article IV recites:

> "It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut head bands of Yanktonais Sioux, a reservation bounded as follows, viz.: * * *" (p. 506.)

The "policy of maintaining just and peaceable relations with the Indians," which was undoubtedly behind the

action of Congress in making the treaty with the Sioux, were considerations for Congress to entertain and act upon or not act upon. The court in the *Buttz* case did not entertain such considerations as a reason for its decision except as such considerations had been acted upon by Congress; for such considerations are purely political and non-judicial. Congress had the option with respect to both the Sioux and the Walapai of making a treaty recognizing Indian claims and avoiding war, or of not making a treaty, refusing to recognize Indian claims and of enforcing its sovereign will if need be by war. It chose the former alternative with respect to the Sioux and the latter with respect to the Walapai. The Walapai were capable of waging war, and did so unsuccessfully.

Cramer v. *United States*, 261 U. S. 219 (1923, Brief, 24). The exact issue decided was that approximately 150 acres, occupied, fenced, and cultivated since 1859 by an Indian family, which had abandoned all tribal relations, was totally excepted from the Act of July 25, 1866 (14 Stat. 239), as land "reserved or otherwise disposed of." The case did not involve land actually passing by grant and alleged to be encumbered with a "possessory right." The decision turned upon practices, instructions, and decisions of the Land Department requiring respect for individual Indian occupancy, which are held to have the legal effect of reserving or disposing of land so occupied. These practices are summarized by Secretary of the Interior Hitchcock, as follows (quoted from the decision below, 276 Fed. 78, 80):

> "This Department has uniformly respected the occupancy of Indians upon the public lands living apart from their tribes, and has, by circular, directed the register and receiver of the several land offices to peremptorily refuse all entries of filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon (see cir-

cular of May 31, 1884, 3 L. D. 371; reissued October 26, 1887, 6 L. D. 341), and has held that such lands are not unappropriated lands within the meaning of section 2289 of the Revised Statutes and are therefore not subject to homestead entry. See *Ma-gee-see* v. *Johnson*, (30 L. D. 125.)"

The Supreme Court decided these individual Indians rightfully occupied lands actually cultivated and fenced by them, but did not rightfully claim lands not cultivated and fenced but used. Mr. Justice Sutherland said (p. 227):

"That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight."

The language quoted by Petitioner (Brief, 25) is dictum advanced *arguendo*. Its citation of *Beecher* v. *Wetherby* and *Minnesota* v. *Hitchcock* are aids to its interpretation; for these cases are only interpretations and applications of treaties and statutes not here applicable, giving and modifying Indian rights in territories not here in issue. Mr. Justice Sutherland did not mean, we believe, that the Walapai have rights Congress has not granted; and if he did, his dictum is wrong. The case does not establish that "immemorial possession" gives legal rights which the sovereign has chosen not to concede.

United States v. *Shoshone Tribe of Indians*, 304 U. S. 111 (1938, Brief, 16, 26), did not involve "the character of Indian occupancy rights" as Petitioner uses the term. The case is a sequel, on the issue of damages only, to *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), opinion by Mr. Justice Brandeis. The only jurisdiction which the Court was given by the Jurisdictional Act, quoted at 299 U. S. 484, footnote, was to adjudicate "all legal and equitable claims which the Shoshone Tribe * * * may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subse-

quent treaty of agreement * * *." By the treaty mentioned the United States "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians * * * and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." As stated by Mr. Justice Brandeis (page 493), "Under the jurisdictional act the court is to inquire whether the violation of the treaty of 1868 or some later treaty or agreement or some later act of Congress has given rise to legal or equitable grounds of liability." This issue and this issue alone was presented; and no question of rights arising other than from treaty, and from "aboriginal occupancy" as a fact only, can be found in the case.

The two opinions demonstrate that the Walapai have no rights. In a history no more marked by denial of Shoshonean and confirmation of Arapaho right than the history we recite is marked by denial of Walapai right and confirmation of Respondent's rights, the Arapaho were held to have acquired the rights that Shoshones once had. (299 U. S. 495-6; 304 U. S. 115-116.) The United States having taken from the Shoshones their solemnly guaranteed treaty rights, they no longer possessed such rights. They did not upset the disposition of their former property by the Sovereign. That disposition was final because a result accomplished in the exercise of sovereign power. The Shoshone had only a right of action against the United States.

Leavenworth, Lawrence & Galveston R. R. Co. v. *United States*, 92 U. S. 733 (1875, Brief, 27). In this case the Indians had had a technical reservation since 1825. This land was held not included in a railroad grant which was a present grant of public lands, and which excepted from its operation lands reserved for any purpose.

Wilcox v. *Jackson*, 13 Pet. 498 (1839, Brief, 27), held that land on which Fort Dearborn (Chicago) was located

ould not be acquired under the preemption laws because t had been made a military reservation, and also a reservation for Indian purposes, and for a lighthouse. The making of such "reservations" is the process by which lands are withdrawn from the application of the land laws, such as preemption laws, donation laws, and the Granting Act here in issue (at 513). We locate nothing in this decision to sustain Petitioner, but much to destroy its position.

Beecher v. *Wetherby*, 95 U. S. 517 (1877, Brief, 27), established that certain lands passed to Wisconsin by its school grant, though at the time of the grant the lands were held by Indians under a treaty (Indian rights were not directly in issue). "For many years before Wisconsin became a State, that tribe [Menomonee] occupied various portions of the territory and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty boundaries of land claimed by different tribes of Indians as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case." (p. 525.) The Indians involved in the *Beecher* case had treaty rights; accordingly, the case merely emphasizes by contrast that the Walapai were never accorded similar rights by treaty or otherwise, but were denied them by the many laws and their administration which we review.

Spalding v. *Chandler*, 160 U. S. 394 (1896, Brief, 27), was a decision that an Indian reservation established at Sault Ste. Marie under treaty with the Chippewas, June 26, 1820, continued as a reservation until extinguished by a treaty dated August 2, 1855, with the same tribe, and that because of reservation, the lands were not subject to pre-

emption. The discussion upon which Petitioner probably relies had reference to statutes and treaties by which the political arms of the Government had in various territories, but not for the Walapai and not for many others, "from the formation of this government," created Indian possessory rights. The language should not and can not be understood to mean that Indians have possessory rights whether granted to them by the sovereign or withheld.

Minnesota v. *Hitchcock*, 185 U. S. 373 (1902, Brief, 27). "Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; * * * the effect was to leave the Indians in a distinct tract reserved * * *." (p. 289.) The case contains no possible support for Petitioner. The issue lay between the United States and Minnesota. The lands were lands secured to the Chippewas by treaties, and later conveyed to the United States to be sold for Indian benefit. The Court held, on a construction of treaties and statutes, that the Minnesota school land grant did not attach.

C. *The Extension of the Laws of the United States to Arizona Did Not Vest in the Walapai Title to Any Lands.*

We will analyze Petitioner's argument that by the extension of the trade and intercourse laws (Brief, 36-40), and the fact that this Court has applied those laws to reservations actually established under the laws of Congress (Brief, 30-36), the Walapai have rights to occupy, not only the lands which have been given them, but other lands, to-wit, those in controversy here.

From the bare premise that the Act of 1850 extended the laws of the United States, and the Act of 1851 "declared the Indian trade and intercourse laws to be in force

in that territory" (Brief, 36-40), is built the conclusion that Congress created possessory rights in the Walapai and other Arizona Indians coincident with aboriginal possession, and outside of their reservations. This position will not bear analysis. The Act of 1850 extended the laws of the United States which were "not locally inapplicable." The Act of 1851 extended the Indian intercourse laws, "or such provisions of the same as may be applicable." Neither gave Indians property rights, or defined what right they might have had. Congress was plainly extending the laws that forbade selling liquor to Indians, extending to Pueblos (already known to be possessed of rights to land) the protection which Petitioner earnestly demonstrates that they have been accorded, and providing for the application of the intercourse laws to any circumstance to which they might be or might become applicable. No one doubts that when Executive order reservations were provided, some of the intercourse laws became applicable; by the same token, no one can rationally dispute the intercourse laws are not in effect outside of Indian reservations. There is a State of Arizona with full governmental power. There is white ownership. Settlers settled on the lands by invitation of Congress and received patents. They drove their stock and were not liable to pay $1.00 each time a head of their cattle grazed on Arizona land.

The laws claimed to have been extended, to which importance is attached (Appendix to Petitioner's brief, pp. 1-4) are:

> SEC. 9. Persons driving stock on land "belonging to any Indian tribe" without its consent are fined. This is not a grant of lands to Indians or a definition of lands "belonging." To the Pueblo lands this law was "applicable"; if to other lands, only upon demonstration of ownership not demonstrable by the intercourse laws.
>
> SEC. 10. The Indian Department officials are given authority to remove persons unlawfully in the "In-

dian Country." The "Indian Country" is undefined. No grant of rights to specific Indians is made, and no definition of the bounds of "Indian Country" is given. Congress made by other acts all the "Indian Country" in Arizona; and it includes none of the lands in this litigation.

SEC. 11. Persons settling on, surveying, or marking trees on "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe" are punished and subject to expulsion by military force. Perhaps the Pueblo lands qualify under this section; but Petitioner has shown no treaties had been made in 1851 securing lands to any New Mexico or Arizona Indians other than Pueblos.

SEC. 12. Conveyance of lands or any title or claim thereto by Indian tribes or nations is required to be by treaty with the United States. This does not grant titles, or define where they exist or in whom.

SEC. 22 shifts the burden of proof, in trials of right of property between "an Indian" and "a white person," to the white person when the Indian shall make out a case of possession. What relation this section can have to a tribal claim, or the merits of any title, or to anything except procedural matters in a case between individuals, we are unable to imagine.

SEC. 23 authorizes removal by military force of persons in the "Indian Country" unlawfully, provides for seizure of property unlawfully introduced therein, and requires that the whites shall be "humanely treated" when deported. Indian country is left for definition to other actions by Congress or its authority.

It is self-evident, we submit, that the extension of United States laws, in so far as applicable, did not provide either land or Indian policies. Such policies were left to be evolved in other acts, which must be examined if the land or Indian policy is to be ascertained. The answer from them is plainly against the Indians.

The fallacy in counsel's treatment of the Indian intercourse laws is apparent again in the argument center-

ing around the decisions of this Court applying them (Brief, 30-36).

Petitioner cites cases holding that the Pueblo Indians, who had Spanish grants confirmed by Congress, and California Indians on an executive order reservation, were under guardianship and subject to the Indian laws. From this premise it is thought to follow that the Walapai, who had no Spanish grant but do have reservations created for them, must have rights greater than their reservations.[20] Though Pueblos are permitted only lands granted by Spain and confirmed or granted by the United States, and Hoopa Valley Indians have only a reservation, the Walapai, Petitioner argues, are entitled not only to what the United States have given them but to vast possessions for which they can show no concession from any sovereign.

Counsel assert that in *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, this Court "rejected" the "argument that because these Indians had received no written documents of title they did not constitute 'Pueblos' and had no capacity to bring suit to defend their land claims" (Brief, 34). We challenge the position that this Court held that the Papagoes had title notwithstanding they had no grant from Spain or Mexico, or rejected the "argument" in any manner disposing in one way or another of its merits. The case can not be regarded as a "decision of this Court upholding the substantive rights of these Papago Indians" (Brief, 34).

It is claimed that, in *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, "this Court held that the unproved claims of these Papago Indians to lands aboriginally occupied was within the scope" of the law requiring contracts to be ap-

20. In support of this astonishing position, *United States* v. *Chavez*, 290 U. S. 357, *United States* v. *Sandoval*, 231 U. S. 28, and *United States* v. *Candelaria*, 271 U. S. 432, are cited. These cases merely hold that Pueblo Indians, on lands granted by Spain and confirmed by the United States, are wards and are subject to the Indian intercourse laws. *United States* v. *Kagama*, 118 U. S. 375, is also cited. It involved a crime committed on a duly established California Indian reservation.

proved; counsel say, "If aboriginal possession is thus protected"; also, that this Court in 1927 rejected "the argument that Spanish and Mexican law recognized no Indian rights based on occupancy" (Brief, 79).

In these two cases, neither Papago claim nor decision of this Court was based on the theory that Indian occupancy as a fact creates right as a matter of law.

Lane v. *Pueblo of Santa Rosa*, 249 U. S. 110, involved claim that a formal grant of lands had been made by the Spanish sovereign to a Pueblo, incorporated under Spanish laws, and made a corporation, capable of suing to defend its rights, by act of Congress. The Supreme Court took the allegations to be true, and the case was reversed to give the alleged Pueblo a chance to prove its case, leaving all allegations of fact open to challenge.

In *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, the trial court had dismissed the case because counsel had no authority to bring it. The Court of Appeals of the District of Columbia affirmed the case, not because counsel had no authority to act, but on the merits. The Supreme Court held that in taking this action the Court of Appeals erred, because there was no authority in fact vested in counsel by the Indians, and, secondly, because even had there been such authority in fact vested, the law required such authorizations as were before the court to be approved by the Department of the Interior.[21]

21. The argument that because the Court applied Sections 2103 and 2116, now Title 25, Sections 81 and 177, U. S. C. A., it necessarily held that the Papagos were entitled to what they claimed (or, more accurately, what they did not claim, Brief, 35, 78-9) is unsound for many reasons. The Court said it was not deciding the merits; the argument insists the Court decided them. The Hunter contracts would have required departmental approval, under the statutes, before the Papago could have authorized him to prosecute claim, even though the result might be judgment of their invalidity. It is also worthy of note that the Department has shifted the Papago about at its own pleasure, and that its latest demarcation of their boundaries is held by the Solicitor to be the "measure of their legal right." 54 I. D. 359, at 370. The statutes in question read, in so far as pertinent:

> "*Contracts with Indian tribes or Indians.* No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any

These two decisions were determinative of nothing here at issue. We cannot better summarize their lack of effect than the Solicitor of the Department of the Interior summarized it in his opinion concerning the Papago Indians, 54 I. D. 359, at 361:

> "It is to be remarked that during all these years of Indian occupancy and of Federal action presupposing the inclusion of the land in question within the public domain, only one instance of formal assertion of Indian title is recorded. In that case the Supreme Court of the United States considered an Indian claim to a particular small area within the Papago country. The litigation was indecisive. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919); *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315 (1927). Under these circumstances and at this late date, those who assert that the Indians hold fee simple title to this land must bear a substantial burden of persuasion."

Two Court of Claims cases correctly set forth the rule of law which should be applied. In *Hagt* v. *United States and the Utah Indians*, 38 Ct. Cls. 455, the Court said:

> "The extension of the trade and intercourse laws over the Indians in New Mexico and Utah did not have the effect to make those territories Indian country." (p. 460.)
>
> "It became Indian country when the United States set apart a reservation, and not until then, and to the extent of the reservations assigned to them only." (p. 464.)

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money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: • • •" (Title 25, Sec. 81, U. S. C. A.)

"*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Title 25, Sec. 177, U. S. C. A.)

> "We are constrained to hold that with the acquisition of territory from Mexico the treaty-making power intended to Americanize the ceded territory. * * * The only rational view to take of the matter is that that country became Indian country only where the Indians had the exclusive right to occupancy." (pp. 464-5.)

Even an appropriation for expenses of extinguishing Indian claims has been held not to be a political recognition creating rights, *Duwamish, et al., Indians* v. *United States*, 79 Ct. Cls. 530, 607 and—

> "In this connection it is apropos to state that the recognition by the Government of Indian title by occupancy is not established by proof of the innumerable contacts of the tribes with Indian agents in the administration of Indian affairs. The general policy of the Government, indexed in its gratuity appropriations, is not of itself a congressional action conferring upon the tribes a proprietary right in their occupied lands which may be asserted against the Government's alleged invasion, in the absence of a law granting the privilege." (*Ibid.*, 606-7.)

D. *There Are No Acts Performed by the Executive Department Which Vest Title to the Lands in Question in the Walapai.*

The section of Petitioner's brief (Brief, 47-59) which indicates by its heading that it will deal with executive interpretation of the 1866 act and executive acts with respect to lands of the Mexican cession which together "confirm the existence of possessory rights in lands aboriginally occupied" does not, in fact, touch any executive action dealing with the Act of 1866, and deals with no executive action which tends to confirm the existence of possessory rights in lands aboriginally occupied by the Walapai. The "kinds of administrative material" dealt with is classified by counsel as:

1. Foreign treaties. One is mentioned.

2. Indian treaties. None with the Walapai exists. Their rights have been otherwise measured.

3. Regulations of the executive departments. Not one is found. This circumstance is thought to demonstrate that the Walapai have been conceded rights outside their statutory reservation and their executive order reservation.

We will consider these classes of "administrative material" in order.

1. *Foreign treaties.* The treaty of Guadalupe Hidalgo only (Appendix, 3) is referred to, and particularly its eleventh section, admittedly applicable to the Walapai. The terms of this treaty are entirely at odds with the claim that is made for it. It guarantees no protection to any Indian tribe as claimed (Brief, 48), but guarantees protection to Mexico from the results of Walapai removal by the United States and the settling by American citizens on lands formerly occupied by Walapai. The "obligation to a sister republic" was and is a political one. If Congress had driven the Walapai to Mexico, its action would have been right, in so far as any judgment or any relief possible from this Court is concerned. Further, it is plain from the protocol, second paragraph (Appendix, 6), that the only titles the United States undertook to protect were *grants of land* in the ceded territories.

2. *Indian treaties* are next. It can not avail Petitioner that other Indians along the route statutorily designated for the Atlantic & Pacific had rights accorded by treaty. The cession by Mexico occurred at a time when the Indian policy of the United States was in a period of transition. As has been noted, inquiry by agents sent to California resulted in a report that the wild tribes had no rights under the laws of Spain and Mexico, and Congress thereafter, save for exceptional instances, made no treaties with Indians in the ceded territory. At this time, the practice of making treaties with Indians anywhere was coming to an end. It was formally prohibited for the future by the

Act of 1871; but already the new policy born of the relatively greater power of the United States had been made effectual, as, for instance, in the assignment of the Walapai to a statutory reservation and in the refusal to concede any possessory rights to Indians in California, who, under the new policy, were forced on to reservations created by treaty or Executive order. There were a few survivals of the old custom of making treaties. There had been several treaties with the Navajo, made by the military authorities during the wars against that tribe. Col. Donovan proceeded against them in 1846, and made a treaty of peace in that year. This treaty was soon broken, and in 1849, at the end of another expedition led by Col. Washington, another treaty was made and also broken. In 1863, Col. "Kit" Carson killed the Mohaves' live stock and took most of the Mohaves to Fort Sumner, New Mexico, holding them in captivity there until 1867, when they were taken back to their old hunting grounds. 2 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, p. 41. In 1868, there was, as has been noted by Petitioner, another treaty, published in 15 Stat. 619, setting aside a reservation for them and taking from them an agreement that they relinquished all right to occupy territory outside their reservation.

The Eastern Apaches originally resided in territory that had been Texan. In the Eighteenth Report of the Bureau of American Ethnology, page 923, appears the following account of them:

> "The Apache alluded to here as Eastern bands comprised the bulk of the Jicarilla and Mescalero Apache. Their country lay to the eastward of the Rio Grande river, extending into Colorado and Texas, where it overlapped the Kiowa and Comanche claim. A few of them concluded a treaty Oct. 17, 1865, by which they agreed to confederate with the Cheyenne and Arapaho upon a reserve assigned the latter in Indian Territory. Subsequently, by treaty of Oct. 21, 1867, they were

confederated with the Kiowa and Comanche upon a reserve assigned the latter tribes in Indian Territory. Those so confederated relinquished their claim to ancestral territory, but they were few in number. No other treaty of purchase was made with these Apache, but those not confederated with the Kiowa and Comanche have been assigned reservations from time to time, all of which are shown on New Mexico map No. 2. The original domain of the Eastern Apache is here partially shown on New Mexico map No. 1, and is fully delineated on special Texas map."

The treaties made with the Ute Indians are sufficiently described in *Haut* v. *United States*, 38 Ct. Cls. 455, to which reference is made for complete analysis of these treaties and the Navajo treaty.

The remaining treaties cited by Petitioner are with respect to Indians in territories remote from the territory claimed by Walapai and with an entirely different history of legislative and treaty action.

Petitioner loses sight of the fact that the United States has dealt some times with a territory as a whole, some times with Indians in a large territory as a group, but more typically with specific Indians and their specific claims by specific treaties, statutes, or executive orders. The rights of a tribe to particular lands can not be measured by the rights of other tribes in other lands. The precise question is the particular claim of the Walapai to have particular lands described in the complaint, and this issue can not be solved by examining the title of other Indians as to other lands. The Walapai have been given their rights, but these only may they enjoy.

3. *Regulations of the executive departments* is the third and last category of "administrative materials" advanced. This material is the absence of any regulations; and we suggest that if the Walapai were possessed of any right other than to the lands given them by Congress and the

President's executive order, some affirmative indication of such right would appear. Because the regulations do not say that the Walapai were denied rights beyond what Congress and the President gave them, it is argued that they must have had such rights (Brief, 51-2). This result is reached on reasoning that there was a general protection of Indians outside of the Mexican cession, and if there had been any disposition to deny the Walapai the rights elsewhere accorded some indication would have appeared in the regulations. The fault of this argument lies in its assumed premise that Indians outside of the Mexican cession were given rights other than those derived by political action of Congress or the Executive or the treaty-making power. None such has been discoverable by us.

> "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them as a place of domicile for the tribe, and they hold and occupy it with the consent of the United States, and under their authority." *United States* v. *Rogers*, 4 How. 567, 572; *Stephens* v. *Cherokee Nation*, 174 U. S. 475, 485.

Every case cited by Petitioner of Indian tribal rights that have been judicially protected in any part of the United States has been an instance of rights held by virtue of a statute, treaty, or Executive order; and it would be a curious result if, because Indians other than Walapai have been given rights by Congress, or the Executive, or the treaty-making power, Walapai who enjoy rights flowing from Executive order and from statute should enjoy not only the results thus received, but other rights not based on any concession from the sole sources of legal right.

Counsel for the Indians assert that a prior valid title of the Indians has been found to have existed in a number of cases, notwithstanding action by the Congress and the Executive purporting to dispose of their lands. A number of cases are cited, but in none of them, after disposals of

Indian lands by Congress or the Executive, was the Indian title to the lands held to be still existent.[22]

In each of the cases cited the disposal by Congress or the Executive was not disturbed. The complete assumption of all except two was that the United States had taken and disposed of the lands in the exercise of its undisputed power to do so, and following such action the Indian title was destroyed and the Indians had left only a claim against the United States for damages. In each of the cases cited, damages against the United States were awarded.

In two of the cases the Court expressly decided the question of whether there had been an effective taking and disposition by the United States. In *United States v. Creek Nation*, 295 U. S. 103, officers of the United States, without lawful authority, had mistakenly included certain lands, held in fee simple title by the Creeks under a treaty and a patent, in lands utilized for other Indians and allotted to them in part and in part sold to white settlers. Congress, knowing of this disposition, allowed it to stand, and the Court held that in view of this inaction of Congress the disposals were ratified and effectual.

In the *Shoshone* case [illegible] its first appearance in the Supreme Court, 299 U. [illegible], Mr. Justice Cardozo held that in view of an early [illegible]ng by administrative officers of Shoshone property granted by treaty, and its devotion to use by another tribe, an original unlawful taking was converted into a taking by the sovereign in its undoubted power to take and dispose of the Indian title.

In each of the cases cited, except in one phase only of

22. Cited are: *New York Indians v. United States*, 170 U. S. 1; *Blackfeet, et al. v. United States*, 81 Ct. Cls. 101; *Fort Berthold Indians v. United States*, 71 Ct. Cls. 308; *Shoshone Indians v. United States*, 82 Ct. Cls. 23, the same case on appeal, 304 U. S. 111, and the same case in its earlier decision, 299 U. S. 476; *Assiniboine Indian Tribe v. United States*, 77 Ct. Cls. 347; *United States v. Klamath Indians*, 304 U. S. 119; *United States v. Mille Lac Chippewas*, 229 U. S. 498; and *United States v. Creek Nation*, 295 U. S. 103 (Petitioner's Brief, 56-8, footnotes 38 to 42, inclusive).

the *Assiniboine* case, 77 Ct. Cls. 347, the Indian rights at issue had been originally rights to land guaranteed by treaties negotiated pursuant to the treaty-making power, ratified by the Senate, and proclaimed by the President. In each there was an enabling act which defined the jurisdiction of the Court and, except in one phase of the *Assiniboine* case, confined the jurisdiction of the Court to a jurisdiction to ascertain and determine whether treaty or statutory rights of Indians had been violated and to fix damages for any violation ascertained to have occurred.

In the *Assiniboine* case, the Court of Claims was permitted to award damages against the United States for the taking of lands which the Assiniboines might prove they had occupied immemorially. They were unable to prove immemorial, exclusive occupancy of the area in question.

In net result, these cases demonstrate that with respect to Indian rights guaranteed by treaty, disposals made by Congress, by the Executive with the express authority or ratification of Congress, or by any other means by which the sovereign United States may lawfully act, are valid disposals, and that a disposal having been determined to have been made, the Indians have, not rights to the lands once held by law or treaty, but instead a substitute claim for damages against the sovereign. These cases deal only with the measure of legal rights accorded to the Indians by express terms of treaty or law; and the result reached in each instance is an interpretation of the treaty or law according right to the Indians, and the law according and limiting jurisdiction of the court.

Why these decisions are inserted in a discussion of "administrative material" is a question as difficult to answer as the question of how Petitioner can not realize that those cases prevent the relief herein sought. By contrast with the Indian rights protected in those cases,

by award of damages against the United States for the taking of rights based upon treaties conveying to the Indians complete beneficial title, the Walapai claim asserted against the disposal of the United States, and based on no treaty and no statute, and asserted against the weight of ninety years of legislation and administration denying the claims they assert and creating in them rights not here in issue, stands in a most unfavorable light.

To the "three classes" of "administrative material" counsel for the Indians add two expressions of opinion, admittedly unimportant. In one of them the Indian Superintendent of the Territory of Utah expressed opinion that the United States accepted the cession subject to all just rights of the Indians. Obviously Judge Doty was speaking in language calculated to influence Congress in the formulation of laws but not proper for consideration by a court in determining the intent of laws actually enacted. The Commissioner of Indian Affairs in his report for 1872 did express the opinion (Brief, 53) that the Government had never recognized any distinction between Indians in the territory ceded by Mexico and Indians living elsewhere. This expression is true in the sense that Indians in all the territory of the United States acquired such rights as they possessed under the laws of the United States by Act of Congress, by treaty, or by Executive action. The exact measure of land right accorded to any Indian tribe anywhere has always been dependent upon the action by the power that creates rights under our constitutional system. That power, with respect to the Walapai, created rights in the 1865 reservation, the 1883 reservation, and nowhere else. The exact administration of the law with respect to the Walapai, the lands of Arizona, and the Atlantic & Pacific Railroad, was reported to Congress in 1872, as it had been theretofore and was repeatedly afterward, by the President, transmitting, as it was his

lawful duty, the reports of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office. The President in his report for this year, in accounting to Congress how he and those under his direction had been executing and intended to execute further the laws of Congress, as required by the Constitution, stated, with respect to Indians in Arizona, that the Army was being employed to effectuate the policy of the sovereign to force them to give up their hunting grounds, submit to the white development that Congress had decreed, and to restrict them to the reservations provided. Arizona was to be, under the policy of Congress and its application by Executive officers charged with making that policy effectual, devoted to white development, and to this end the Indians were to be confined to reservations provided. The military was to force them to submit to the will of Congress; the railroad was to be built and used both as an aid to white development and as a means of destroying the Indian possession which had theretofore stood as an obstacle to white development. We reproduce the pertinent excerpts from this report of the President to Congress in 1872, at pages 112 to 116 of the Appendix.

This was no mere expression of opinion by administrative officials. There was nothing scattered or doubtful about this communication to Congress of the President's interpretation of its policy. There is nothing doubtful about President Grant's instruction to General Schofield that Indians on their reservations would be protected but those who would not submit to the rules and regulations laid down for them would be forced to comply with the will of Congress.

Year after year, this same nature of report was made. These were not scattered or doubtful. They were the public records, publicly required by law to be made, of the

interpretation and execution of the laws of the United States by those charged with their execution. Upon the strength of these reports, Congress appropriated moneys and enacted legislation in entire harmony with and furtherance of its policies, the execution of which they reported.

No considered opinion, counsel for the Walapai say, has ever been rendered as to the relative rights of the Walapai tribe and the railroad. In 1919, the relative rights within the Walapai Reservation of the Indians and the railroad were at issue. The Secretary of the Interior received from the Commissioner of Indian Affairs the arguments that have been made in this case, and determined that the railroad's right was perfect. He so reported to Congress, and Congress enacted legislation on the strength of his findings. Patents are alleged to have issued to all second cause lands, and it is conclusively presumed that the Secretary of the Interior, with power and under the necessary duty of determining what was and what was not granted, determined that the railroad had full right and title. No other inference is possible after the President has attested by patents final evidence of full and complete title, that the United States has conveyed, as provided by the act, the "right and title" (Sec. 4, Appendix, 33) "to have and to hold" (R. 24).

Not only is the institution of this suit not an evidence of any Departmental determination against the rights of Respondent, as intimated by counsel for the Walapai (Brief, 56), but it is distinctly doubtful that an action so apparently contrary to the policy and law of the United States can lawfully be brought.

X.

There Is No Need to Reverse the Case for the Taking of Testimony.

In Point 3 (Brief, 92-104), counsel for the Indians are confused as to what the courts below decided and the grounds for their decision. If the grounds of those decisions are correct, there is no need to question factual occupancy, tribal organization, or voluntary cession. What must be overcome by Petitioner is the holding of the courts below that regardless of tribal organization, tribal occupancy, extent of claim, and voluntary cession or lack of it, the laws of the United States, enacted in the exercise of plenary political power, and the administration thereof under lawful authority, have denied the Walapai the rights they claim and confirmed Respondent in the right and title which they challenge. Such is the effect of the public history of the United States taken from sources which, as expressions of law and public history, cannot and are not sought to be controverted.

It did not matter in *Barker* v. *Harvey*, 181 U. S. 481, that the Indians had physically occupied the lands they claimed. Evidence of factual possession of and tribal relation to the land was taken in that case, and held properly stricken because any right held under the laws of a prior sovereign had been lost by failure to present it to the Court provided within the time allowed, and because the legislation and administration of the United States had not itself created any such right as claimed. In *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, evidence was, as in this case, refused, because the result was determined by controlling considerations such as are present in this case, and which did not take into account possession in fact, which has no right-creating power. We respectfully submit that a protracted trial would be only

on factors which could not alter the result necessarily dictated by acts of Congress, and administration.

It mattered not in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, and *Conley* v. *Ballinger*, 216 U. S. 84, that the Indian rights involved were held under solemn treaty. Even the legal relationship of the Indians to the land does not affect a disposal thereof made by Congress in the exercise of its absolute power. It made no difference, in *United States* v. *Creek Nation*, 295 U. S. 103, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, that the taking by the United States and the disposal by it was a destruction of treaty rights. In the *Lone Wolf* and *Conley* cases, and in *Super* v. *Work*, 3 F. (2d) 90, affirmed by this Court, 271 U. S. 643, dispositions were sought to be enjoined, and in each case injunction was refused. In *Super* v. *Work*, 3 F. (2d) 90, 91, the Circuit Court of Appeals said:

> "(2-4) The rights of the Indians in the present case differ from those in the cases above cited only to the extent that in those cases they were Mission Indians, while in the present case, at and prior to the cession by Mexico, the plaintiff Indians were merely roving bands. Congress at all times exercises plenary authority over the tribal relations of Indians. The power thus exercised is in its nature political, and not judicial. It has accordingly been held not to be subject to the control of the judicial department of the Government. The power of Congress is so absolute that it may abrogate even the provisions of an Indian treaty, which authority arises from its paramount power over the property of Indians by reason of its exercise of guardianship. Congress may in the exercise of this power determine the rights of Indians to the occupancy of lands, and, if injury occurs, the relief must be sought from Congress, and not from the courts. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565, 23 S. Ct. 216, 47 L. Ed. 299."

In affirming, this Court said (271 U. S. 643):

> "Affirmed upon the authority of (1) *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance*

Company, 265 U. S. 472; (2) *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Conley* v. *Ballinger*, 216 U. S. 84, 90."

As indicated in the history we have elaborately reviewed, this action is in reality against a disposal by Congress of that which was within its plenary power to dispose. We respectfully submit that the dispositions refused to be enjoined in the *Conley, Lone Wolf,* and *Super* v. *Work* cases were final, and that after title had vested in grantees of the United States, the Indians could not have attacked the conveyances or reasserted a right by those conveyances denied them, as was held in *Barker* v. *Harvey, United States* v. *Title Ins. & Trust Co., United States* v. *Creek Nation*, and *Shoshone Tribe* v. *United States*.

We have said that counsel for the Indians have mistaken the issue here and the holdings of the courts below. The courts below held that all questions of fact were immaterial in view of the plain intent of Congress and the indisputable effect of administration. The Circuit Court of Appeals did not, any more than did Respondent, admit, as claimed (Brief, 93-4, 104), that possession in fact ever gave any Indians legal rights. The court below correctly held that Indian titles in Arizona were those derived by confirmation or concession by the United States; and there is no suggestion that an actual possession in fact had the power to create a right in any group of Indians who had no concession of legal right from the sovereign.

Counsel for the Walapai charge that the Circuit Court of Appeals either directly or implicitly proceeded upon factual assumptions, or made findings of fact with respect to questions of occupancy and tribal organization (Brief, 93, 94-5), and charge that the trial court accepted Respondent's contention that the Walapai had abandoned their claims (Brief, 99). These claims of counsel apparently flow from a misunderstanding of the action of the courts below, which were both predicated upon the unmistakable will of Congress operating on a subject matter over which

it had complete power, and the concrete application of the sovereign intent to the lands, the Indians, and the railroad. To this theory, and to this action, all questions of occupation in fact, Indian organization, and Indian intent were immaterial, and were expressly so held.

There are several details which we do not wish to pass without challenge, though not material in our conception of the case. Counsel say the Walapai were recognized as a tribe by the United States. To the Act of 1865 they were "Indians" of the Colorado River (Appendix, 26). To the Executive order of 1883 they were "Hualpai Indians" (W. F., 146). The Act of 1925 makes no reference to them as a tribe (Appendix, 68). Such references as we have located in the appropriation statutes [23] refer to them simply as Walapai Indians. No treaty was ever made with them conceding their political power and giving rights as a tribe. There may be some late recognition by the Interior Department of which we are unaware; but whatever the fact in this connection, there has been no recognition of the Walapai as possessed of the land rights they claim in this proceeding.

The discussion of the creation of the 1865 reservation we challenge in many particulars. The Act of 1865 was considered below as an unequivocal act of Congress assigning these Indians, who had no rights elsewhere, to a reservation, an act which would have been in itself sufficient to deny the present claim. Whether the act was passed with or without Indian consent, Indian consent was given, though unnecessary.

The impeachment of the character of Poston (Brief, 99) is uncalled for. The letter referred to on page 97, footnote 85, is reproduced for the Court in the Appendix, page 117. His horror at the murders and depredations of the treaty-

23. "To enable the Secretary of the Interior to purchase * * * for the support of the Hualpais Indians in Arizona * * * dollars." 23 Stat. 94, and 377-8; in similar wording, 24 Stat. 41 and 461; 25 Stat. 230 and 995, 26 Stat. 351 and 1004; 27 Stat. 134 and 627; 28 Stat. 302 and 891; 29 Stat. 337; 30 Stat. 77, 585, and 937; 31 Stat. 234; 32 Stat. 257, 993.

breaking Apaches (1 Hodge, *Handbook of American Indians*, Smithsonian Institution, Bureau of American Ethnology, Bulletin 30, House Document No. 926, Part 1, 59th Cong., 1st Sess., page 63) was the typical reaction of the times, his letter a truthful portrayal of the policy of Congress in other particulars up to the present time. Nothing could be more absurd than the idea that Poston was trying to get elected by false promises to the Indians, who could not vote. The Commissioner of Indian Affairs reported to Congress what Poston and the Indians had agreed to, with some graceful literary flourishes (W. P., 33, R. 69), but did not "recommend" any proposal to the Indians, as alleged by Petitioner (Brief, 99).

All included in Petitioner's Point 3 is entirely beside the point. The courts below found that the Walapai, regardless of any organization or occupancy issue sought to be raised, had been denied the rights claimed, and that Respondent had been confirmed in its title. These findings were based upon a history of law and administration that was not controverted below and can not be controverted here. While the case does not turn on the fact issues in question, we have reproduced in the Appendix, pages 90 to 111 the material called to the attention of the courts below.

XI.

Conclusion.

This case is respectfully submitted. It presents an issue both complex and yet in its final analysis quite simple. Complex, not in the sense of complicated or intricate, but complex only in that a great number of official dealings over a long interval are all to be considered; simple, because all of this complex fits into a single easily understood pattern. The issue is to be considered as one involving three parts:

(1) what did Congress do;

(2) what was the intention of Congress in doing what it did; and

(3) what was its power?

As to (1) and (3) we do not understand that counsel differ among themselves in any material respect. That Congress had power we think is fully conceded. This leaves the question of *intention* as the gist of the case. That question we submit is to be settled by the acts of Congress—the Granting Act and those *in para materia*. If there be ambiguity in any of these from which the intention of Congress can not certainly be derived then the Court will apply the familiar rules of construction and interpretation.

From all this complex but one answer can be found, affirming the conclusion of the two lower courts to the effect that the beneficial ownership as well as the legal title were, and were intended to be, conferred upon Respondent's predecessor, the Atlantic & Pacific.

No amount or character of evidence of occupancy based upon "aboriginal possession" can possibly change the result.

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